

No. 08 971 JAN 29 2009

**In The OFFICE OF THE CLERK
Supreme Court of the United States**

ROBERT SIMPSON RICCI, et al.,

Petitioners,

v.

DEVAL L. PATRICK, in his capacity as Governor
of the Commonwealth of Massachusetts, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Circuits are split on the deference to be given a district court's interpretation of a consent decree. The First Circuit in this case and the Second, Third, Fifth, Tenth, Eleventh and D.C. Circuits apply a *de novo* standard of review. On the other hand, the Sixth, Seventh, Eighth and Ninth Circuits have given considerable deference to the district court's interpretation of a consent decree which the court either negotiated and fashioned or which it administered over a period of years. And the Fourth Circuit affords special deference to a district court's interpretation of a consent decree in public interest litigation, as in this case. The questions to be examined in this case are as follows:

1. Should any deference be given to the interpretation of a consent decree or any order issued thereunder by a district court which negotiated and fashioned the consent decree and supervised and administered the decree for many years, as the Sixth, Seventh, Eighth and Ninth Circuits have held, as opposed to decisions of the First Circuit in this case and the Second, Third Fifth, Tenth Eleventh and D.C. Circuits which grant no deference to such an interpretation.

2. Did the First Circuit err in refusing to give any deference to the interpretation given to an order issued under a consent decree by a

district court who fashioned, supervised and administered a consent decree for over thirty years in public interest, institutional reform litigation

3. Should deference be given to a decision of the district court interpreting an order issued by it under a consent decree which decision is based upon further factual findings made by the district court?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners: Robert Simpson Ricci, Association for Retarded Citizens of Massachusetts, Inc.; The Paul A. Dever Association for Retarded Citizens, Inc.; Wrentham Association for Retarded Citizens; Disability Law Center, Inc.; Fernald Development Center Class members, Belcherton Plaintiffs; Monsoon Plaintiffs.

Respondents: Deval L. Patrick, in his capacity Governor of the Commonwealth of Massachusetts; Judyann Bigby, in her capacity as Secretary of the Executive Office of Health and Human Services; Elin M. Howe, in her capacity as Commissioner of the Department of Mental Retardation; Commonwealth of Massachusetts Department of Mental Retardation

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Petitioners Association for Retarded Citizens of Massachusetts, Inc., The Paul A. Dever Association for Retarded Citizens, Inc. and Disability Law Center, Inc. are not-for-profit corporations and as such have no parent corporations nor is there any publicly held corporation that holds ten per cent or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, members of the class in the cases of *Ricci v. Patrick*, Civ. Act. Nos. 72-0469-T, 74-2768-T, 75-3910-T, 75-5023-T and 75-5210-T (D.Mass), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in these proceedings on October 1, 2008, with an amended judgment issued on November 14, 2008.

OPINIONS BELOW

The opinion of the First Circuit is reported at 544 F.3d 8 (1st Cir. 2008) and is reproduced in Appendix A at App. 1-34. The final amended judgment of the Court is unreported and is reproduced in Appendix E at App. 80-81. The opinion of the District Court reopening the Disengagement Order at issue in this case is reported at 499 F.Supp.2d 89 (D.Mass. 2007) and is reproduced in Appendix B at App. 35-45. A subsequent order of the District Court is reported at 535 F.Supp.2d 229 (D.Mass. 2008) and is reproduced in Appendix C at App. 46-47. The Final Order issued by the District Court providing for the disengagement of the court and return of the facilities to management of the Commonwealth authorities (with a provision for reassertion of jurisdiction by the court), is reported at 823 F.Supp. 984, 986-989 (D.Mass 1993) and is reproduced in Appendix D at App. 48-79.

JURISDICTION

The judgment of the Court of Appeals was issued on October 1, 2008. Following a motion for rehearing, the First Circuit issued an amended judgment on November 14, 2008. (App. 80-81). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. and the Fifth and 14th Amendments to the Constitution were at issue in the underlying litigation, but are not implicated in the judgment.

STATEMENT OF THE CASE

The decision below is the latest example of an irreconcilable conflict among all twelve regional courts of appeals on an important and recurring issue of appellate review, namely the review standard to be applied to a district court's interpretation of consent decrees and its own orders springing from such decrees. All twelve regional courts of appeals have reached square holdings on the issue, and the only touchstone among them is deep division. The First Circuit, here, like several other courts (including the Second, Third, Fifth, Tenth, Eleventh and D.C. Circuits) have held that pure *de novo* review

applies. Others (including the Sixth, Seventh, Eighth and Ninth Circuits) apply a deferential review standard depending on whether the district court entered the original consent decree or administered it over a long period of time. Other Circuits (including the Fourth) adopt a more deferential standard in public interest, institutional reform cases. Not only is this Circuit split broad, it is acknowledged. In the very case upon which the court below purported to rely in adopting its *de novo* standard of review, the First Circuit earlier had acknowledged the conflict that existed on this issue. See *F.A.C. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192. n. 4 (1st Cir. 2006),

The abuse of discretion standard is the most appropriate standard to apply because the district court's review is not akin to the interpretation of a contract negotiated between parties at arms length, as the courts who have established a *de novo* review standard have held. Rather, the district court's interpretations are framed by its experience in having closely overseen the litigations for years (decades in this case) and turn upon findings of fact made on the basis of extensive evidentiary hearings, the application of the facts to orders it drafted, and the underlying purpose of the orders and decrees it entered.

The result of the disparate standards applied across the circuits is that materially

different results occur in similar cases. Indeed, had the First Circuit applied abuse of discretion review here or even some deferential review, there would have been no basis to overturn the finding of the District Court that the Commonwealth of Massachusetts had violated its Disengagement Order, thus permitting it to reopen the case and to enforce the underlying consent decree that it had imposed in the preceding years. Because it is clear that the First Circuit's *de novo* review was essential to its decision to reverse the district court, this case presents an excellent vehicle for this Court to resolve the disarray in the lower courts over this recurring issue of federal appellate review. The petition should be granted.

PROCEDURAL BACKGROUND

A. Underlying Litigation

A class action was filed in the District of Massachusetts in 1972 on behalf of the mentally retarded residents at Belchertown State School, one of the state mental retardation facilities. Similar suits were filed in the next three years involving other state facilities, including, in 1974, the Fernald Development Center in Waltham, Massachusetts. The basis of the suits was that services, programs and conditions at the facilities were so inadequate that they violated the residents' constitutional and statutory rights under the federal Rehabilitation Law and the Social Security Act. All of the cases

were assigned to District Court Judge Joseph L. Tauro, who consolidated the five institutional cases. In 1977, the parties entered into a consent decree, crafted by Judge Tauro, requiring the Commonwealth to improve the physical facilities and employ additional professional and direct care staff to operate and maintain the facilities in a manner consistent with the standards imposed by Title XIX of the Social Security Act. See *Ricci v. Callahan*, 97 F.R.D. 737 (D. Mass. 1983).

B. The District Court Administers the Consent Decree

The consent decree was administered by Judge Tauro thereafter. For the next several years, Judge Tauro made numerous on-site visits to all the mental retardation facilities; conducted frequent extensive hearings; issued several orders; established a quality control mechanism, staffed by, and responsible to, the District Court, and he effectively managed all services related to, and required for, the mentally retarded residents. See 576 F.Supp. 415 (D. Mass. 1983), 646 F.Supp. 378 (D.Mass 1986), 781 F.Supp. 826 (D. Mass. 1992), 1992 WL 163215 (D. Mass. June 24, 1992), 1992 WL 175509 (D.Mass July 21, 1992). Some of those orders were reviewed by the First Circuit. See *Massachusetts Association for Retarded Citizens v. King*, 643 F.2d 899 (1st Cir. 1981)(refusing to review monitoring orders issued by district court); *Massachusetts Association for Retarded Citizens v. King*, 668

F.2d 602 (1st Cir. 1981)(reversing District Court decision invalidating new state law on charge-for-care); *Ricci v. Okin*, 978 F.2d 764 (1st Cir. 1992)(Breyer, J.)(refusing to review interlocutory order of District Court);

C. The District Court Issues a Disengagement Order

In 1993, the district court issued a final disengagement order, returning management of the mental retardation facilities to the state of Massachusetts, noting the progress that had been made in improving the facilities, due to federal court supervision. (See Appendix D, App. 48-79).

The District Court then issued an order supplanting and replacing each of the consent orders that it had previously issued. See App. 53. Central to the Final Order were requirements that each resident be afforded an individual service plan ("ISP"). The court stated:

2.. . . (a) Defendants shall substantially provide services to each class member on a lifetime basis. The specific services to be provided to each class member to meet this obligation, and defining this obligation, shall be set forth in an Individual Service Plan ("ISP") that details each class member's capabilities and needs for services, pursuant to the regulations governing the preparation of

ISP's, as currently set forth in 104 CMR 20, *et seq.* (the "ISP Regulations") (App.54)

The order also required that certain steps must be taken before any patient is transferred to another facility.

4. Defendants shall not approve a transfer of any class member out of a state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent community region) certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that all ISP-recommended services for the individual's current needs as identified in the ISP are available at the new location. (App. 57)

The Commonwealth defendants were ordered not to "undermine the progress achieved during the period of this litigation." In particular they were required to "maintain[] and implement[] the basic principles of the ISP." (App. 58)

Further, Judge Tauro crafted a provision in the Disengagement Order to allow the District Court to reassert jurisdiction if the

Commonwealth failed to follow the requirements in the Order:

7. a. If the defendants substantially fail to provide a state ISP process in compliance with this Order, or if there is a systemic failure to provide services to class members as described in this Order, the plaintiffs may seek enforcement of the Order pursuant to this paragraph. Individual ISP disputes shall be enforced solely through the state ISP process. (App. 59-60).

D. The District Court Finds Its Disengagement Order Violated and Reasserts Its Jurisdiction

In 2003, the Commonwealth announced its plan to close the Fernald Development Center together with all other Department of Mental Retardation ("DMR") development centers and to move the residents to five other residential facilities or to a community based setting.

In 2006, after numerous residents had been voluntarily transferred from Fernald to other DMR facilities and community residences, Petitioners sought relief from the District Court, in accordance with the Final Order, claiming that the Commonwealth had failed to provide a proper ISP procedure in accordance with that Order.

The District Court preliminarily enjoined the Commonwealth from transferring any more residents from Fernald, pending further investigation. Without reopening the underlying case, the District Court appointed U.S. Attorney Michael Sullivan as court monitor to investigate and prepare a report on the voluntary transfers of Fernald residents to other Commonwealth facilities or community residences.

After more than a year of "exhaustive and meticulous study" of all alternative facilities, the Court Monitor concluded in a March 6, 2007 report that "Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an 'equal or better' service outcome." (App. 37-38).

The District Court reviewed the court monitor's report and the Monitor's conclusion that "for some Fernald residents, a transfer 'could have devastating effects that could unravel years of positive non-abusive behavior,'" (App. 39-40). The District Court concluded that "the Commonwealth's stated global policy judgment that Fernald should be closed had damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis." (footnote omitted)(App. 39).

On that basis, the District Court found that the Commonwealth had engaged in a

"systemic failure' to provide a compliant ISP process," reasserted jurisdiction over the case and issued a mandatory injunction to remedy this failure: (App. 40). He issued the following order:

Any further communication from defendant Commonwealth of Massachusetts Department of Mental Retardation to Fernald residents and their guardians which solicits choices for further residential placement shall include Fernald among the options which residents and guardians may rank when expressing their preferences. (App.42)

Explaining the importance of the ISP process, the District Court stated:

An essential function of the ISP process is to give residents and guardians a voice in important decisions. It is intended to provide an individual and personalized analysis of each resident. Administering this process under the global declaration that Fernald will be closed, however, eviscerates this opportunity for fully informed individualized oversight. To dismiss the benefit of hearing the voices and wishes of those most directly impacted invites the devastating effects about which the Monitor has warned. The DMR declaration not only disenfranchises the

participants in the ISP process, it also deprives the DMR itself of valuable information, thereby undermining the efficacy of the ISP process. As a consequence, such administration of the ISP process amounts to a "systemic failure" to provide a compliant ISP process, within the meaning of the Final Order (App. 40).

The District Court explained why the decision to close Fernald and exclude it as a possible continued alternative for Fernald residents was a "systemic failure."

As this court oversaw entry of the Final Order, it is uniquely competent to declare that "systemic" simply was intended to have its plain dictionary meaning—"of or relating to a system." Webster's II New College Dictionary 1120 (2001). Accordingly, a systemic failure need not be catastrophic in and of itself. Rather, it may simply be a problem of any magnitude, which manifests itself on a system-wide basis, across a number of ISP processes (App. 41).

Judge Tauro's decision did not mandate that Fernald be kept open indefinitely but simply required that the residents and their guardians be permitted to participate in the ISP process in the manner mandated in the 1993 Final Order. It allows the residents and their

guardians to express a preference to remain at Fernald when the DMR solicits choices for further residential placements, and it mandates that Fernald be part of the discussion in the ISP process for families that express such a preference. That is, rather than simply ranking the choices offered by the DMR, the resident or guardian may, under Judge Tauro's order, express an opinion as to whether any proposed transfer would meet or fail to meet the equal or better standard and would provide all ISP mandated services for that resident. To the extent that the ISP process, prior to the August 2007 order, omitted Fernald as a choice in the placement discussion, that process effectively failed to consider whether the proposed transfer is or is not opposed by the resident or guardian. It also failed to provide an opportunity to consider whether any proposed alternative placement would meet the "equal or better" standard and would provide all ISP mandated services compared to Fernald.

Ultimately, the Court pointed out, the preference of a resident or guardian to remain at Fernald may not carry the day, and Judge Tauro made it clear that he was "simply ensuring that the DMR use the ISP process to adequately assess whether the setting is appropriate *and* whether it is not opposed by the affected individual." (App. 43). His order restored to the ISP process the right of the resident or guardian to be heard, it effectively provides the required constitutional safeguards, and it mandates that

the DMR demonstrate that any alternative placement meets the "equal to or better" standard and that all ISP mandated services be provided. It does not give families absolute veto power over any proposed transfer or the ultimate closure of Fernald.

E. The First Circuit Decision

On appeal, the Court of Appeals found that there was no basis for the District Court to reassert jurisdiction in this case.

First, the Court established the legal rule to apply in cases of this kind.

The terms of the consent decree embodied in the Disengagement Order, like any contract construction issue, present an issue of law that we review *de novo*. See generally *F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192 (1st Cir. 2006). Our view of the proper construction is different from the district court's. (App. 21)

Reviewing the District Court decision *de novo*, it concluded that the order reasserting jurisdiction was incorrect. It noted that the Final Order contemplated that the DMR would be able to close institutions (par. 7(b), (App. 22) and in fact several DMR facilities were consolidated and some were closed (App. 22).

The Court of Appeals also found that there was no systemic failure by the DMR to "discharge its ISP duties for any Fernald resident between 2003 . . . and 2007" (App. 23). It rejected the District Court's conclusion that the closing of Fernald constituted a systemic failure under the terms of the Final Order. The Monitor and the Court had already accepted the transfer of 49 residents of Fernald, "it cannot follow that the fact of the announcement caused a systemic failure." (App.24).

The Court of Appeals concluded that the removal of one of several available residential facilities does not mean that there was a failure of the ISP process: "the ISP process focuses only on the services a resident is to receive; the ISP process does not specify where those services are to be delivered." (App. 25). The Court of Appeals rejected the District Court's conclusion that categorically rejecting Fernald as a possible alternative, undermined the ISP process. Other residential facilities could be adequate. "Under the Disengagement Order, the question of whether a transfer will result in an equal or better placement is separate from the question whether the Commonwealth has correctly implemented the ISP process." (App. 26)

If individual Fernald residents are concerned that the ISP process will not result in their receiving equal or better service, then the solution, according to the Court of Appeals, is to request a conference and an adjudicatory

hearing in state court, pursuant to the Final Order.

If in an individual case there is a failure to provide through the ISP process "an individualized and personalized analysis of each resident," a concern expressed by the district court, then the remedy is provided by state regulations, which inform the ISP process. . . . This concern then, does not satisfy the conditions for reopening the decree or warrant federal intervention in state proceedings. (App.28)

On that basis, it reversed the decision of Judge Tauro reopening the consent decree and applying the Disengagement Order. It concluded:

The issue this court decides concerns the limits on the jurisdiction of the federal courts. We do not decide the issue of what path best serves the interests of the residents of Fernald and the other parties who have a stake in this matter. People of good faith can and do passionately differ about the Commonwealth's intention to close the Fernald Center. We hold only that the district court lacked authority to reopen the consent decree in this case and that it lacked jurisdiction on that or any other basis to reopen and to enter the orders it did. (App. 33-34)

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REASONS FOR GRANTING THE WRIT

Review Is Warranted To Resolve a Conflict That Divides All Twelve Regional Courts Of Appeals Regarding the Correct Standard Of Review Of Fact-Bound Consent Decrees.

- A. There is a Split in Authority Among the Circuits as to What Deference Should be Given to the Interpretation of a Consent Decree by the District Court Which Negotiated the Decree and/or Administered That Decree for Many Years.

The question what standard of review applies to a district court's interpretation of a consent order has divided the courts of appeal around the country, largely because this Court has itself given conflicting signals as to the proper standard. Thus this Court wrote in *United States v. ITT Continental Baking Co*, 420 U.S. 223, 238 (1975) that "... a consent decree or order is to be construed for enforcement purposes basically as a contract," thus suggesting that a *de novo* standard should be applied. However, elsewhere this Court has acknowledged the importance of a district court's interpretation of a decree that it helped fashion and administer. In *United States v. Atlantic Refining*, 360 U.S. 19, 23-24 (1959), this Court noted:

We merely hold that where the language of a consent decree in its normal meaning

supports an interpretation; where that interpretation has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start; and *where the trial court concludes that this interpretation is in fact the one the parties intended*, we will not reject it simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place. (emphasis added).

This Court recognized the dual nature of consent decrees in *Local No. 93, International Association of Firefighters AFL-CIO v. City of Cleveland*, 478 U.S. 501, 519 (1986).

To be sure, consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts [citations omitted]. More accurately, then, as we have previously recognized, consent decrees "have attributes both of contracts and of judicial decrees," a dual character that has resulted in different treatment for different purposes [citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-237, (1975)]

That “dual character” has produced a major split in the Circuits on the deference to be given a district court’s interpretation of the consent decree.

1. The Fourth, Sixth, Seventh,
Eighth and Ninth Circuits Apply a
Deferential Rule.

At least five other Circuits have concluded, contrary to the decision below, that considerable deference must be given to the court’s interpretation of a consent decree that was fashioned by the district court judge and/or administered by him or her over a period of time, particularly in public interest litigation.

The Sixth Circuit has adopted a “deferential *de novo*” standard for review of a consent decree, depending on whether the district judge interpreting the consent decree was involved in the original negotiation of that decree. The Court explained:

Where as here, though, we are reviewing the interpretation of a consent judgment by the district court that crafted the consent judgment, it is probably more accurate to describe our standard of review as “deferential *de novo*” It is only sensible to give the court that wrote the consent judgment greater deference when it is parsing its own work. As this Court has noted: “[a]t first blush, giving

substantial deference to the district court's interpretation of the [consent] decree appears to be inconsistent with *de novo* review. Yet, in *Brown v. Neeb*, 644 F.2d 551, 558 n. 12 (6th Cir.1981), we explained that the district court's reading of the decree was merely an additional tool for contract interpretation." *Huguley v. General Motors Corp.*, 52 F.3d 1364, 1369-70 (6th Cir.1995). As the Court noted in *Brown*, "[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it." 644 F.2d at 558 n. 12. We agree, and we will review the district court's decision accordingly.

Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 371-72 (6th Cir. 1998)

In this case, it was the "the court that wrote the consent judgment" that is now interpreting the meaning of that decree. Under those circumstances the interpretation made by that judge "should be given greater deference" since it "is parsing its own work."

The Seventh Circuit has also adopted the proposition that deference must be given to the interpretation of the consent decree by the judge who negotiated and crafted the decree. Thus it noted in *United States v. Alshabkhoun*, 277 F.3d 930, 933-34 (7th Cir. 2002):

Because a consent decree is a form of contract, we generally review a district court's interpretation of the consent decree *de novo*. . . . However, where, as here, the district court oversaw and approved the consent decree, we give "some deference" to the district court's interpretation. *Id.*

Judge Posner explained why deference should be given to judges who were present from the beginning in the formation of a consent decree. See *Foufas v. Dru*, 319 F.3d 284, 286 (7th Cir. 2003): "When a judge is interpreting his own order, such as a consent decree that he entered, his interpretation is entitled to greater weight than when he is interpreting a contract with the formation of which he had nothing to do."

The Eighth Circuit has held in *United States v. Knot*, 29 F.3d 1297, 1300 (8th Cir. 1994): "We therefore give a large measure of deference to the interpretation of the district court that actually entered the decree."

In this case, there is no doubt that the District Court did participate in the fashioning of the decree. The Court explained:

For the past two decades, literally thousands of hours have been devoted to fashioning a comprehensive remedial program that has included multi-million dollar capital improvements, establishment of a responsible program of

community placement, as well as significant staffing increases geared to meeting the individual service plans and overall needs of those with mental retardation.

The result is that, working together, we have created an environment for persons with mental retardation that is now characterized by human dignity and opportunity for growth. And we have done so in a way that consistently ensured a full measure of value for every tax dollar spent.

Given this progress, and the demonstrated good will and dedication of Governor Weld to the mission of safeguarding the health, safety and well-being of people with mental retardation, I am today signing a comprehensive Order closing the federal court's oversight of these cases (App. 50-51).

In addition, considerable deference has been given by other courts to the interpretation of a consent decree if the district court has supervised and administered the decree over a long period of time, as in this case.

Thus the Ninth Circuit held in *United States v. FMC Corp.* 531 F.3d 813, 818-19 (9th Cir. 2008):

We review *de novo* the district court's interpretation of a consent decree. *Gates v. Gomez*, 60 F.3d 525, 530 (9th Cir.1995). We generally "give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal." *Id.* (internal quotation marks omitted).

See also *Officers for Justice v. Civil Service Commission for the City and County of San Francisco*, 934 F.2d 1092, 1094 (9th Cir. 1991): "We review *de novo* the district court's interpretation of the consent decree. . . . However, we give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal." See also *Nehmer v. Veterans Administration*, 284 F.3d 1158, 1160 (9th Cir. 2002)(applying test).

That is precisely the situation before the Court now, and the Ninth Circuit rule should be adopted.

Even within the circuits, they sometimes apply one rule (*de novo*) and then in other situations, they apply the other (deferential).

Thus the Court of Appeals in this case cited an earlier case *F.A.C., Inc. v. Cooperativa de Seguros de Vida de Puerto Rico*, 449 F.3d 185 (1st Cir. 2006) for the proposition that the

interpretation of a consent order "presents an issue of law that we review *de novo*." In fact, the cited case states just the opposite. The Court noted in that case:

The law is a shade unsettled as to the standard of review we should apply specifically, as to what weight, if any, is to be given to the district judge's construction of a settlement agreement or consent decree. Our own precedent, perhaps surprisingly, suggests that in this circuit review of the interpretation of settlement agreements (as well as consent decrees) is ordinarily *de novo*. But our precedents also recognize that this cannot be a hard and fast rule. *See Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1337-38 (1st Cir.1991) (exception for "public interest" consent decrees).

449 F.3d at 192.

In the *F.A.C.* case, the court added :

The present situation -- *no evidentiary hearing but personal knowledge by the judge based on his judicial participation in negotiations* -- argues for some deference. Indeed, some of our cases say that an exception may exist where the district judge has "special knowledge concerning the parties' intentions." *Navarro-Ayala*, 951 F.2d at 1339 n. 17; *cf. Malave v.*

Carney Hosp., 170 F.3d 217, 221 (1st Cir.1999). We think this is only common sense.

Showing even the mildest deference, it is easy to sustain the district court's construction of the settlement. (emphasis added). 449 F.3d at 192

The *F.A.C.* court noted that in "public interest" litigation, deference is often given to the interpretation of a consent decree by the district court. Other courts have come to the same conclusion. The Court of Appeals in *Thompson v. United States Department of Housing and Urban Development*, 404 F.3d 821, 827 (4th Cir. 2005) noted the special role of the district court in institutional litigation:

The rule of broad discretion in public interest cases is designed *to give the district court flexibility in deciding exactly how the numerous conditions of a complex consent decree are to be implemented in practice*. In overseeing broad institutional reform litigation, the district court becomes in many ways more like a manager or policy planner than a judge. *Over time, the district court gains an intimate understanding of the workings of an institution and learns what specific changes are needed within that institution in order to achieve the goals of the consent decree.* (emphasis added)

That is precisely the situation here. The district court must be given great deference "*in deciding exactly how the numerous conditions of a complex consent decree are to be implemented in practice.*" The District Court in this case has indeed gained "*an intimate understanding of the workings of an institution and learns what specific changes are needed within that institution in order to achieve the goals of the consent decree.*" Yet the Court of Appeals paid no attention whatsoever to his conclusions on that issue.

Thus in view of the fact that Judge Tauro fashioned and entered the consent decree in this institutional reform case and administered and supervised the decree over 16 years, considerable deference should have been given to his interpretation of the decree and the orders issued pursuant to that decree.

2. The First Circuit (in this case) and the Third, Fifth, Tenth, Eleventh and D.C. Circuits Apply a Strict *Do Novo* Rule in Interpreting a Consent Decree

The reason for the opposite *de novo* review standard was explained by the D.C. Circuit. It held in *Richardson v. Edwards*, 127 F.3d 97, 101 (D.C. Cir. 1997): "We customarily review decisions interpreting consent decrees and the agreements underlying them *de novo*, in the

same manner as we review decisions interpreting contracts. . . . We do so because a consent decree is a form of contract."

Consent decrees are like contracts, the Court held, since usually both are documents that the district court had no role in creating. "It is approved on its face by a court presumably not privy to the details of negotiation, or the parties' subjective intentions. . . . But ultimately the question for the lower court, when it interprets a consent decree incorporating a settlement agreement, is what a reasonable person in the position of the parties would have thought the language meant. . . . That too is the question on appeal and it is a question of law, which is why review is *de novo*." 127 F.3d at 101.

But if a district court was "privy to the details of negotiation or the parties' subjective intention" and further interpreted and applied the consent decree over a long period of time, then the *de novo* rule should not be applied, as many other courts have held.

Other circuits have also adopted the "consent decree is a contract" rule. The Second Circuit has held: "We review a district court's interpretation of a settlement agreement *de novo* ... mindful that the consent decree is a contract between the parties, and should be interpreted accordingly," *Tourangeau v. Uniroyal, Inc.*, 101 F.3d 300, 307 (2d Cir.1996); see also *Barcia v. Sitkin*, 367 F.3d 87 (2d Cir. 2004)(same).

The Fifth Circuit held that "the district court's interpretation of the terms of a consent decree, including whether the decree is ambiguous, is reviewed *de novo*." *Walker v. U.S. Department of Housing and Urban Development*, 912 F.2d 819, 825 (5th Cir. 1990).

Similarly, the Tenth Circuit has held, that "We construe the terms of a consent decree *de novo* using traditional principles of contract interpretation." *Joseph A. ex rel. Corinne Wolfe v. Ingram*, 275 F.3d 1253, 1266 (10th Cir. 2002)

The Eleventh Circuit concurred with this analysis in *Reynolds v. McInnes*, 338 F.3d 1201, 1211 (11th Cir. 2003): "We apply the same rules that govern contract interpretation when we interpret a consent decree, because a consent decree is essentially a form of contract."

The Third Circuit held in *Holland v. New Jersey Dep't of Corrections*, 246 F.3d 267, 277-278 (3d Cir.2001), that "a district court's construction and interpretation of a consent decree is subject to straightforward plenary or *de novo* review," citing a series of earlier Third Circuit cases that uphold such a standard.¹ It

¹ See e.g., *Washington Hosp. v. White*, 889 F.2d 1294, 1299 (3d Cir.1989)(*de novo* review applied) See also *McDowell v. Philadelphia Housing Authority*, 423 F.3d 233, 235 (3d Cir. 2005)(Alito, J)(court of appeals must interpret the "plain

rejected the "deferential *de novo*" standard adopted by many other circuits as an "oxymoron."

We also think that the Third Circuit position is the more reasonable one, because the concept of "deferential *de novo*" (or "deferential plenary") review seems to be an oxymoron. Black's Law Dictionary defines "*de novo*" as "[a]new, afresh, a second time," and defines "plenary" as "[f]ull, entire, complete, absolute, perfect, unqualified." Black's Law Dictionary 392, 1038 (5th ed.1979). These are, of course, familiar notions to appellate judges, the sinews of our everyday work. It strains imagination to conceive how our review could be both "anew, complete, absolute and unqualified," while at the very same time deferential to the District Court's interpretation. Review that gives deference to the decision that is under review is simply not absolute and unqualified review. The courts that apply "deferential *de novo*" do not explain how they amalgamate these two seemingly incompatible standards. We decline to follow these other courts and instead adhere to the long tradition in this Circuit

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text" of the decree).

of reviewing a district court's interpretation of a consent decree *de novo*.

In view of the split in the Circuits described above, review should be granted.

Secondary sources have noted the conflict in this area:

As with any other contract, interpretation of a consent decree is a question of law, and thus the appellate court reviews the order *de novo*. Appellate courts recognize a variation of the standard rule of *de novo* review for consent decrees in instances where interpretation involves a fact-dependent legal standard, or supervision of litigation, particularly in a public law context. Thus, while a trial court's views on the construction of consent judgments are entitled to deference, the interpretation of a consent judgment's provisions are a matter of law subject to full review on appeal. However, there is authority that a court reviews a trial court's construction of such an agreement as an issue of fact subject to the clearly erroneous standard. In such circumstances, a trial court may be better positioned to decide the issue in question, therefore warranting deferential review. [citations omitted]

(2008), § 196

See also James Lindsay Freeze, "United States v. Western Electric: The Deference Difference," 21 *Cap. Univ. L. Rev.* 321 (1992)(explaining different standards applied by the Circuits on the deference to be given district court's interpretation of a consent decree).

B. Deference Must be Given to a District Court's Interpretation of a Consent Decree When It is Based upon New Factual Findings

In addition, some courts have adopted a more deferential rule if the district court's interpretation of a consent decree is based on factual findings.

Thus the Second Circuit has held that a Court of Appeals reviews the meaning of a consent decree *de novo*, but it adds that any factual findings made by the district court can only be reviewed for "clear error." See *United States v. Broadcast Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001).

See also *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transit Authority*, 263 F.3d 1041, 1048 (9th Cir. 2001):

This court reviews *de novo* the district court's interpretation of the consent decree, *but must defer to the district*

court's factual findings underlying the interpretation unless they are clearly erroneous. (emphasis added) ²

In this case, factual findings were made by the Court Monitor to the effect that "Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an 'equal or better' service outcome." (App.38). Yet no deference was made by the Court of Appeals with respect to that factual finding adopted by the District Court.

To the extent that Judge Tauro's order could be considered a modification of the Disengagement Order, great deference is generally awarded to such modification. The Fourth Circuit has explained in *Thompson v. United States Department of Housing and Urban Development*, 404 F.3d 821, 827 (4th Cir. 2005)

We review the district court's decision to

² The Court added: "We must "give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal." *Gates [v. Gomez]*, 60 F.3d [525] at 530 [9th Cir. 1995] (quoting *Officers for Justice v. Civil Serv. Comm'n*, 934 F.2d 1092, 1094 (9th Cir.1991)). *Id.*

modify the Consent Decree for abuse of discretion, *see Thompson I*, [*v. HUD*] 220 F.3d [241,] at 246 [(4th Cir. 2001)] , and “we accept the factual findings on which the district court’s decision is based unless they are clearly erroneous,” *Small v. Hunt*, 98 F.3d 789, 796 (4th Cir.1996). Such a deferential standard of review is warranted in view of the nature and purpose institutional-reform consent decrees:

Id. (emphasis added).

Thus under any of the standards applied by the courts, some deference must be given to the district court’s interpretation of the consent decree and the Disengagement Order. Even assuming that some courts have adopted a *de novo* standard, there is certainly a split in the Circuits over the proper deference that must be given to the district court’s interpretation. Certainly there is some deference given to a district court’s interpretation of a consent decree that it originally entered. Even more deference is given if the district administered the consent decree over a long period. This is certainly true in institutional reform litigation, which is present here. This Court should grant review to resolve that conflict.

D. The First Circuit Erred In Holding That It Could Interpret the Disengagement Order Issued Pursuant to the Consent Decree *De Novo* With No Deference To the District Court's Interpretation Of Its Own Order.

The Court of Appeals held that it could interpret the Disengagement Order with no deference to the analysis made by the District Court which issued the order. This is contrary to the decision of many Circuits that hold that *orders* issued pursuant to the consent decree (as opposed to the decree itself) are subject to a different standard. In this case, the Disengagement Order -- the decision of the district court to remove federal court supervision of the mental retardation facilities and to return management of the facilities to state bodies -- was completely crafted by the District Court judge. As the district court explained:

As this court oversaw entry of the Final Order, it is uniquely competent to declare that "systemic" simply was intended to have its plain dictionary meaning--"of or relating to a system." (App. 41).

Many courts, including the First Circuit, have agreed with the proposition that "the district court is in the best position to explain the meaning of its own order." *Aranov v. Chertoff*, 536 F.3d 30, 38 (1st Cir. 2008). See also *Harvey v. Johanns*, 494 F.3d 237, 242 (1st Cir.2007) ("We must, of course, accord deference to the district

court's interpretation of the wording of its own order"); see also *Lefkowitz v. Fair*, 816 F.2d 17, 22 (1st Cir.1987) ("[U]ncertainty as to the meaning and intendment of a district court order can sometimes best be dispelled by deference to the views of the writing judge.").

Other courts have come to the same conclusion, even those courts which purportedly apply a *de novo* standard to the interpretation of the consent decree itself. See *SEC v. Sloan*, 535 F.2d 679, 681 (2d Cir.1976) (finding "no basis for substituting our judgment for that of the district judge in interpreting his own order"), *In re Cintra Realty Corp.*, 373 F.2d 321, 322 (2d Cir.1967) (expressing "satisf[action] with [district judge's] interpretation of his own order" "[e]ven if the order be deemed ambiguous"); *Gibbs v. Frank*, 500 F.3d 202, 2006 (3d Cir. 2007)("We review a district court's interpretation of its own order for abuse of discretion"); *United States v. Moussaoui*, 483 F.3d 220, 231 (4th Cir. 2007)("a district court's interpretation of its own order is for obvious reasons afforded great weight"); *Kendrick v. Bland*, 931 F.2d 421, 423 (6th Cir.1991)(stating that a district court's interpretation of its own order containing the phrase "major violations of the consent decree" "is certainly entitled to great deference"); *Hastert v. Illinois State Board of Election Commissioners*, 28 F.3d 1430, 1438 (7th Cir. 1994)(the court's interpretation of its order will not be disturbed "absent a clear abuse of discretion"); *Graefenhain v. Pabst Brewing Co, Inc.*, 870 F.2d 1198 (7th Cir. 1989)("To the extent

Pabst's argument is premised on the district court's misinterpretation of one of its own orders, Pabst faces an equally heavy burden -- the district court's interpretation will not be upset unless it constitutes a clear abuse of discretion, since "[f]ew persons are in a better position to understand the meaning of a [court order] than the district judge who oversaw and approved it." *United States v. Board of Educ.*, 717 F.2d 378, 382 (7th Cir.1983)); *United States v. Soderling*, 958 F.2d 1222, 1992 WL149562 *3 (9th Cir. 1992)("We defer to the district court's interpretation of its own orders.") *Kendrick v. Bland*, 931 F.2d 421, 423 (5th Cir.1991)(stating that a district court's interpretation of its own order containing the phrase "major violations of the consent decree" "is certainly entitled to great deference"); *Cave v. Singletary*, 84 F.3d 1350, 1354-55 (11th Cir.1996) ("The district court's interpretation of its own order is properly accorded deference on appeal when its interpretation is reasonable."); *Nix v. Billington*, 448 F.3d 411, 414 (D.C. Cir. 2006)("district court's interpretation and enforcement of its own orders is typically subject to review only for abuse of discretion"); *Sims v. Johnson*, 505 F.3d 1301, 1305 (D.C. Cir. 2007)("The district court's interpretation and enforcement of its orders is entitled to deference, for our review is limited to determining whether there was an abuse of discretion"); *Amado v. Microsoft*, 517 F.3d 1353, 1358 (Fed. Cir. 2008)("A district court's interpretation of its order is entitled to deference unless the interpretation is unreasonable or is

otherwise an abuse of discretion.")

Here the First Circuit ignored this well-accepted proposition, established not only by prior decisions in its own Circuit, but in the 2d, 3rd, 4th, 6th, 7th, 9th, 11th and the D.C. and Federal Circuits as well. It held that orders issued pursuant to a consent decree should be subject to the same analysis as the decree itself, a conclusion that many other courts have rejected. That issue is of prevailing importance in the administration of the federal courts, not merely in the context of institutional litigation. This Court should therefore grant the writ and examine this issue.

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari.

Dated: New York, N.Y.
January 29, 2009

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APPENDIX A

First Circuit Decision

United States Court of Appeals, First Circuit.
Robert Simpson RICCI, et al., Plaintiffs,
Appellees,

v.

Deval L. PATRICK, in his capacity as Governor
of the Commonwealth of Massachusetts, et al.,
Defendants, Appellants.

Massachusetts Association for Retarded
Citizens, Inc., a/k/a Arc/Massachusetts, Inc., et
al., Plaintiffs, Appellants,
Disability Law Center, Inc., Intervenor,
Appellant,

v.

Deval L. Patrick, in his capacity as Governor of
the Commonwealth of Massachusetts, et al.,
Defendants, Appellants.

Nos. 07-2522, 07-2523.

Heard Sept. 3, 2008.

Decided Oct. 1, 2008.

Before LYNCH, Chief Judge, SELYA, Circuit
Judge, and SCHWARZER, ^{FN*} District Judge.

FN* Of the Northern District of
California, sitting by designation.

LYNCH, Chief Judge.

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The Governor of Massachusetts and the state Department of Mental Retardation ("DMR") appeal from an order of a federal district court which both reopens a 1993 consent decree and then requires them to take certain steps as to the residents of the Fernald Developmental Center. *Ricci v. Okin (Ricci IV)*, 499 F.Supp.2d 89 (D.Mass.2007). Appellants, whom we shall call the Commonwealth, deny that the court had any authority to reopen the consent decree or otherwise issue any orders.

The Commonwealth characterizes the order as essentially prohibiting it from relocating residents as it attempts to close the Fernald Developmental Center. The Fernald Center, some 160 years old, has been the residence of over 180 mentally retarded residents committed to the care of the Commonwealth. The Commonwealth announced, in 2003, its intention to move these residents to one of the five other residential facilities or to a community based setting, whichever comports best with each resident's individual service plan ("ISP"). The Commonwealth has committed itself to transferring residents only if the Superintendent at Fernald "certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location." *Ricci v. Okin (Ricci III)*, 823 F.Supp. 984, 987 (D.Mass.1993). The Commonwealth did transfer, in fact, some 49 Fernald residents before February 8, 2006.

The federal district court, which has conscientiously and with great care presided over institutional reform litigation concerning these mentally retarded persons since 1972, *see generally Ricci v. Okin (Ricci I)*, 537 F.Supp. 817, 819 (1982), closed the underlying case in 1993 pursuant to a consent decree whose terms it adopted into a court order known as the Disengagement Order, *see Ricci III*, 823 F.Supp. at 986-89.

Nonetheless, in 2006, the court enjoined the Commonwealth from transferring any more residents on the motion of a class of Fernald residents alleging violation of the decree. *Ricci v. Okin*, Nos. 72-0469-T, etc. (D.Mass. Feb. 8, 2006) (order freezing resident transfers and appointing court monitor). The court found that it had authority under the 1993 Disengagement Order to investigate whether, as the plaintiffs alleged, the Commonwealth was violating the Disengagement Order. The court appointed a monitor, the U.S. Attorney for Massachusetts, to investigate and prepare a report. The court asked the monitor's report to address "whether the past and prospective transfer processes employed by the Department of Mental Retardation comply with federal law, state regulations, as well as the orders of this court." *Id.* The district court's authority to investigate the allegations of violation is not at issue.

After receiving the report, the court, in an

order dated August 14, 2007, found that the conditions for reopening the case contained in the Disengagement Order had been met. It also issued a further remedial order, the specific terms of which we describe later. *Ricci IV*, 499 F.Supp.2d at 92. Those orders are at issue.

The Commonwealth's appeal is from both components of the August 14, 2007 order. The appeal is supported by a number of amici who are of the view that deinstitutionalization is in the best interests of the Fernald residents.^{FN1} In addition, the Massachusetts Association of Retarded Citizens, Inc. appeared as a plaintiff-appellant urging reversal. The Disability Law Center appeared as an intervenor-appellant also urging reversal.

FN1. Amici in support of the Commonwealth are: National Association of State Directors of Developmental Disabilities Services; Association of Developmental Disabilities Providers of Massachusetts; Adlib, Inc.; The Arc of the United States; Boston Center for Independent Living; Independent Living Center of the North Shore and Cape Ann, Inc.; Massachusetts Advocates Standing Strong; Massachusetts Council of Human Service Providers, Inc.; Massachusetts Families Organizing for Change; MetroWest Center for Independent Living, Inc.; National Disability Rights Network; Northeast Independent Living Program;

Service Employees International Union; Local 509 of the Service Employees International Union; Stavros Center for Independent Living; and United Cerebral Palsy.

On the other side, the plaintiffs' arguments to uphold the district court's decision are supported by other amici.^{FN2} In addition, the Wrentham Association for Retarded Citizens, Inc. appeared as a plaintiff and appellee on behalf of a class composed of residents at the Commonwealth's Wrentham Developmental Center, stating that in its view, the issues involved in this case affected residents in other state institutions for the mentally retarded such as Wrentham.

FN2. Amici in support of the plaintiffs are: Massachusetts Coalition of Families and Advocates for the Retarded, Inc.; and Voice of the Retarded, Inc.

We review first whether the district court had authority to reopen this case because the Commonwealth violated the Disengagement Order or the residents' constitutional rights and whether the court had authority to reopen on some other basis. Because we conclude there was no basis for the district court to reopen the case or otherwise assert jurisdiction, we do not reach the issues relating to the remedial order. We reverse the district court, vacate its order, and order dismissal of these proceedings for lack of

jurisdiction.

I.

We set forth the factual background for this suit, starting with the events which precipitated these proceedings.

A. Actions By the Commonwealth Which Led to This Action

In three budgetary acts from 2004-2007, the Massachusetts legislature directed DMR to take appropriate steps to consolidate or close its six Intermediate Care Facilities for the Mentally Retarded ("ICFs"), including Fernald. Several reasons were articulated. The legislation stated one purpose of the directive was to promote compliance with a Supreme Court decision, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999). That decision, in turn, emphasized the congressional intent in Title II of the Americans with Disabilities Act of 1990 ("ADA") to avoid discrimination against mentally disabled persons by promoting their placement into community settings. Another stated purpose was to further the Commonwealth's own established policy of reducing its institutional capacity and of providing services to patients in less restrictive settings. This policy decision was grounded in evidence of prior successful transitions of a number of mentally retarded residents from residential settings, from the past closing of

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other ICFs. Further, the Commonwealth was cognizant of national trends toward deinstitutionalization and the need for certainty in planning matters such as personnel placement. The legislature required DMR to reduce capacity at these ICFs, provided that equal or better services for residents could be furnished in community settings.

Another consideration for the Commonwealth was how to use its available resources for the care of the mentally retarded. DMR had received estimates in 2001 for the amount of capital expenditures needed to maintain each ICF. As of 2001, Fernald needed \$14.3 million in capital expenditures to repair its infrastructure and \$41.2 million to achieve full compliance with the ADA. The Fernald facility was ranked first among the Commonwealth's ICFs in needed capital costs. Indeed, the average daily cost of services at Fernald as of FY 2007 was over \$700 per person a day, or \$259,000 per person annually.^{FN3} By contrast the costs at the other ICFs ranged from \$433 to \$590 per day. The Fernald per-resident cost was also more than 2.5 times the average annual per-person cost of residential community-based services. In 2007, these were at \$280 per day or \$102,103 annually per patient, including day programs and transportation services.

FN3. These figures in part reflect the reduced population at Fernald due to the earlier transfers of residents.

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As of May 2007, there were 186 Fernald residents living in a facility that once housed nearly 2,000 individuals. The remaining residents included 131 in the profound range of mental retardation, 40 in the severe range, 12 in the moderate range, and 3 in the mild range. Fernald Center residents ranged in age from 36 to 95 years old, with an average age of 57. Some 38 Fernald Center residents were aged 63 or older.

In 2003, as said, the Commonwealth announced its intention to close Fernald by transferring its residents to equal or better care in its other five ICFs or into community based settings, including group homes.^{FN4} The Commonwealth planned to keep open at the Fernald campus a 24-person residential unit and a skilled nursing center which can serve 29 individuals. It began its program in 2003 and has successfully transferred 49 of approximately 238 residents. Of these, 35 residents were transferred to other ICFs and 14 were transferred to community residences.

FN4. This was a general policy announcement, which was not accompanied by a formal timetable to close Fernald.

The efforts of the Commonwealth to make these transfers were brought to a halt in February 2006 when, as described above, the

federal district court, acting at the behest of a purported class of the remaining 189 Fernald residents, enjoined the process pending further investigation.

B. The History of the Ricci Class Action

In 1972, residents of the Belchertown State School, a state institution for the mentally retarded, filed a class action against state officials alleging that conditions there violated their constitutional and statutory rights. *See Ricci I*, 537 F.Supp. at 819; *see also Ricci III*, 823 F.Supp. at 985-86. A class action challenge to conditions at Fernald was filed on July 23, 1974. Complaint, *McEvoy v. Goldmark*, No. C.A. 74-2768-T (D.Mass. July 23, 1974). Suits were also filed on behalf of residents of other state institutions. *See Ricci I*, 537 F.Supp. at 819. The actions were consolidated before Judge Tauro of the U.S. District Court for the District of Massachusetts.

After the suits were filed, the court took day-long views of conditions at the facilities. *Ricci I*, 537 F.Supp. at 820. The court determined that the Commonwealth was not providing the constitutionally required minimum level of care. The Commonwealth defendants chose not to dispute this and instead "agreed to work with the plaintiffs and the court to fashion comprehensive remedial programs that would be memorialized in the form of consent decrees." *Id.* The parties entered into separate interim

consent decrees, one for each institution, in 1977, and a consent decree governing personnel in 1978. *Id.* at 820-21.

The district court actively oversaw the implementation of the consent decrees for almost ten years. *See generally Ricci v. Okin*, 978 F.2d 764, 764 (1st Cir.1992). On October 9, 1986, the court entered an order which set out a list of specific tasks for the Commonwealth to accomplish and represented a "step of disengagement" for the court. *Id.* The order contemplated the court's final disengagement after three years, a term that the parties extended by agreement. *Id.* at 764-65.

The class action effectively ended in 1993 when the parties entered into a final consent decree, which the district court adopted in a final Disengagement Order.

C. The Disengagement Order

On May 25, 1993, the district court signed an order "closing the federal court's oversight of the[] [consolidated] cases." *Ricci III*, 823 F.Supp. at 985. The Disengagement Order, which supplanted and replaced all prior consent decrees and court orders, adopted the parties' final consent decree. Several provisions of the Disengagement Order are important for purposes of these appeals.

First, the Disengagement Order

terminated the court's jurisdiction over the cases. The cases could be reopened and jurisdiction could be asserted only if certain explicit conditions were met. The Order allowed "action[s] to enforce the rights of the plaintiff classes" only when they were brought "pursuant to the terms of paragraph 7" of the Order. *Id.* at 986 (Disengagement Order ¶ 1).

Paragraph 7, in turn, allowed class members to seek enforcement of the Disengagement Order if one or more of three conditions had been met. Plaintiffs were required to show that 1) "defendants substantially fail[ed] to provide a state ISP process in compliance with [the] Order"; 2) defendants engaged in "a systemic failure to provide services to class members as described in [the] Order"; or 3) defendants engaged in "a systemic failure to provide ISP services required by [the] Order." *Id.* at 988 (Disengagement Order ¶ 7). The Order did not, however, allow plaintiffs to reopen "based solely on facts known by them as of the date of [the] Order." *Id.* It also explicitly prohibited plaintiffs from enforcing the Commonwealth's state law obligations in a federal court action.

Second, the Disengagement Order outlined the obligations DMR owes to class members. Under the Disengagement Order, the Commonwealth may not transfer a class member from a state school to a community residence "until and unless the Superintendent of the

transferring school ... certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that all ISP-recommended services for the individual's current needs ... are available at the new location." *Id.* at 987 (Disengagement Order ¶ 4). This commits the decision to transfer a resident of Fernald to the Superintendent of Fernald, who makes the certification.

Review of that certification is not in the federal court, but rather through state administrative procedures. *See generally* 104 Mass.Code Regs. 29.15. Under the applicable regulations, if an individual or guardian objects to the transfer, he or she may file an appeal within 30 days of receipt of the ISP. DMR must attempt to resolve the matter through an informal conference with the client and his or her legally authorized representative. The resident may then petition for a hearing. The individual has the right to be represented at the hearing, to present evidence and call witnesses, and to examine DMR's records. Under state law, "[t]he hearing officer shall determine which placement meets the best interest of the ward giving due consideration to the objections to the placement made by the relative or permanent guardian." Mass. Gen. Laws. ch. 123B, § 3. The objecting party may then seek judicial review of the hearing officer's decision through appeal to superior court. *See* Mass. Gen. Laws. ch. 30A, § 14. There is no claim in this case that the

Superintendent has failed to make such certifications for prior transfers from Fernald or will fail to do so for future transfers.

Third, the Disengagement Order details the Commonwealth's obligations with regard to the ISP process. An ISP details each resident's "capabilities and needs for services" such as medical or psychological care. *Ricci III*, 823 F.Supp. at 986-87 (Disengagement Order ¶ 2(a)); *see generally* 104 Mass.Code Regs. 29.06(2). ISPs are drafted after individual meetings between evaluating professionals and clients and their guardians. *See* 104 Mass.Code Regs. 29.06(2)(b). The Disengagement Order required DMR to comply with state regulations governing ISP planning and mandated that any changes to the Commonwealth's ISP regulations continue to "guarantee that each class member be provided with the least restrictive, most normal, appropriate residential environment." *Ricci III*, 823 F.Supp. at 987 n. 2; *see also* 104 Mass.Code Regs. 29.06(2)(a)(2).

D. The Motions to Reopen

The Ricci class members filed a motion to reopen the case in 2004. The Massachusetts Association for Retarded Citizens, Inc. appeared as a class representative for the Wrentham and Dever plaintiff classes, who had not been included in the Ricci class members' motion to reopen but had separately alleged that DMR was not in substantial compliance with the

Disengagement Order. It ultimately filed a notice of appeal from the district court's August 14, 2007 order. As a result, we have two appeals before us from the same district court order. The Ricci class members based their 2004 motion to reopen on the Commonwealth's alleged violation of the Disengagement Order. Specifically, they claimed that the Commonwealth had "substantially failed to provide a state ISP process in compliance with the Order," had engaged in "a systemic failure to provide services to class members as described in the Order," and were "not in substantial compliance with the Order with regard to systemic issues." Motion to Reopen and Restore Case to Active Docket and Enforce the Final Order of May 12, 1993, at 1, *Ricci IV*, 499 F.Supp.2d 89 (D.Mass.2007) (Nos.72-0469-T, etc.).^{FN5} As noted, the court appointed a special monitor to investigate the allegations raised in the plaintiffs' motion and their reports to the court.

FN5. Plaintiff Wrentham Association filed a similar motion on February 7, 2006. The motion contained similar allegations and was premised on similar grounds.

E. *The Monitor's Report*

The court monitor completed a 13-month investigation into the transfers from Fernald between February 26, 2003 and February 8, 2006. The monitor reviewed all of DMR's records for the transferred individuals and interviewed

most of the individuals or their guardians. The monitor also visited the individuals' new placements as well as all of DMR's ICFs and many of the locations for community placement. In addition, the monitor hired independent medical professionals to assess each individual whose transfer was planned, in order to review whether these individuals would receive "equal or better" services in the new location.

The monitor reviewed allegations that DMR had violated the Disengagement Order's requirement that it "certify[] that individuals to be transferred will receive equal or better services at their new residences" and "certify[] that ISP recommended services for the individual's current needs are available at the new location." The monitor's report concluded that DMR had complied with both obligations.

The report also found DMR to be in compliance with its procedural obligations under state law, such as the requirement it provide notice to guardians forty-five days in advance of a transfer and the requirement that it ensure guardians knew they had a right to visit and examine the proposed homes. The report also found no violations by DMR of federal regulations, such as 42 C.F.R. § 483.12, which governs transfer standards for skilled nursing facilities. Finally, the monitor found no violation of state regulations governing informed consent. *See* 115 Mass.Code Regs. 5.08(1)(a).

In addition, the monitor examined conditions at the Commonwealth's other ICF facilities, to which Fernald residents could be transferred. The monitor concluded that "[e]ach facility currently ha[d] the minimum services, staffing and amenities to provide equal or better services."

The monitor's report also inquired into guardians' assessments of their satisfaction with the resulting placement and their participation in the transfer decision. The monitor reported the results of a survey distributed to guardians of the 49 transferees. Guardians were asked to rate their satisfaction with their wards' placements on a scale of one to five, with one being the most favorable. The results showed 78% rated their satisfaction as a "1," 14% rated their satisfaction a "2," 1% rated their satisfaction a "4," and another 1% rated their satisfaction a "5."

Thus, the monitor's report concluded that the DMR had complied with the Disengagement Order and state and federal law in effectuating past transfers of residents from Fernald.

As to future transfers, the report offered the monitor's opinion that:

As a result of a year long investigation, our office has concluded that some of the residents at Fernald could suffer an adverse impact, either emotionally and/or physically, if they

were forced to transfer from Fernald to another ICF/MR or to a community residence.

... Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an "equal or better" outcome.

Report of Court Monitor Michael J. Sullivan at 27, *Ricci IV*, 499 F.Supp.2d 89 (D.Mass.2007) (No. 72-0469-T) [hereinafter "Monitor's Report"]. The monitor stated his opinion that "residents should continue to have the opportunity and option to move from Fernald to other ICFs, or to a community residence, provided that the Certification Process is enforced" but that "Fernald residents should be allowed to remain at the Fernald facility." The monitor also suggested that Fernald could be changed by reducing the facility's acreage, building new residential units, and consolidating residences.

F. The District Court's August 14, 2007 Order

The district court reviewed the monitor's report, affirmed the monitor's finding that there had been no past violation of the Disengagement Order, and agreed that "[f]or some Fernald residents, a transfer 'could have devastating effects that unravel years of positive, non-abusive behavior.'" *Ricci IV*, 499 F.Supp.2d at 91 (quoting Monitor's Report at 24). The court concluded that "the Commonwealth's stated global policy judgment that Fernald should be

closed ha[d] damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis." *Id.* (footnote omitted).

On this basis, the court held that a necessary condition for federal court intervention-that the Commonwealth had engaged in a " 'systemic failure' to provide a compliant ISP process"-had been met. *Id.* at 91.

The court issued a mandatory injunction to remedy this failure:

Any further communication from Defendant Commonwealth of Massachusetts Department of Mental Retardation to Fernald residents and their guardians which solicits choices for further residential placement shall include Fernald among the options which residents and guardians may rank when expressing their preferences.

Id. at 92. The court administratively closed the case and the Commonwealth appealed.

II.

The Commonwealth argues that there was no basis on which the court could assert jurisdiction over the matter and asks that the action be dismissed.^{FN6}

FN6. Even if the district court did have authority, the Commonwealth argues, the

August 2007 order was improper because: (1) it exceeded the bounds of the 1993 Disengagement Order; (2) it improperly issued a mandatory injunction when neither federal law nor the Disengagement Order had been violated; and (3) it effectively mandated that the Commonwealth keep Fernald open indefinitely, which is beyond the power of a federal court. We do not reach those arguments.

The Commonwealth argues that there are three bases on which the court might have authority to reopen, but says none is present here. Those bases are "the defendants' failure to abide by the terms of the [Disengagement Order]; an ongoing violation of the Constitution; or a significant change in either the factual circumstances or the law." The first basis arises from the terms of the Disengagement Order itself. *See Ricci III*, 823 F.Supp. at 988 (Disengagement Order ¶ 7). The second condition requires that there be a finding of a violation of a federal constitutional provision, thus providing a basis to issue a decree, but the decree "must directly address and relate to the constitutional violation." *Milliken v. Bradley*, 433 U.S. 267, 281-82, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977); *see also Lovell v. Brennan*, 728 F.2d 560, 564 (1st Cir.1984) (noting that a court may exercise continuing jurisdiction in a case if it finds a constitutional violation or the likelihood of a constitutional violation in the near future).

The third and final condition represents the “traditional power of a court of equity to modify its decree in light of changed circumstances,” *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004), subject to the strict limits the Supreme Court has imposed for finding such modifications.^{FN7}

FN7. The plaintiffs argue that the court's conclusion that it had authority to reopen can also be justified as an exercise of its “ancillary jurisdiction” or “inherent jurisdiction.” We discuss this argument later.

The district court based its authority to issue the order on the first condition: a purported violation under the terms of Paragraph 7 of the Disengagement Order. Plaintiffs urge affirmance on that ground but argue the order is supportable on the other two.

We conclude that the district court does not have authority to reopen the case on any permissible basis. We explain.

A. Whether the Consent Decree Provided Authority to Reopen the Case

The Disengagement Order allows class members to seek enforcement of the defendants' obligations in federal court “[i]f the defendants substantially fail to provide a state ISP process” as detailed in the Disengagement Order or “if

there is a systemic failure to provide services to class members.” *Ricci III*, 823 F.Supp. at 988 (Disengagement Order ¶ 7). The district court held that the Commonwealth’s administration of the ISP process under its global closure policy “amount[ed] to a ‘systemic failure’ to provide a compliant ISP process” within the meaning of the 1993 consent decree. *Ricci IV*, 499 F.Supp.2d at 91.

The terms of the consent decree embodied in the Disengagement Order, like any contract construction issue, present an issue of law that we review de novo. *See generally F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192 (1st Cir.2006). Our view of the proper construction is different from the district court’s.

Several provisions of the Disengagement Order are important. First, the Order plainly contemplated that DMR, in its discretion, would be able to close institutions.^{FN8} *Ricci III*, 823 F.Supp. at 987 (Disengagement Order ¶ 5). Second, the Order does not permit state law, including the ISP regulations or review of the Superintendent’s certification decision, to become enforceable in the federal court. *Id.* at 988 (Disengagement Order ¶ 7(b)). Thus, the Disengagement Order preserved to DMR the discretion to “allocat[e] its resources to ensure equitable treatment of its citizens without federal court interference.” *Id.* at 987 (Disengagement Order ¶ 5).

FN8. In 1993, years before it issued the August 2007 order, the district court recognized the Disengagement Order did not prohibit the closing of any facility. *Ricci III*, 823 F.Supp. at 987 (“[N]othing in this Order is intended to detract from or limit the discretion of the defendants in... allocating its resources to ensure equitable treatment of its citizens.”). It also acknowledged in 1992 that DMR could close any facility. *See Ricci v. Okin (Ricci II)*, 781 F.Supp. 826, 827-28 (D.Mass.1992) (“The court is not opposed to the eventual closing of Dever or any other [pre-1993] Consent Decree facility.”); *see also Ricci IV*, 499 F.Supp.2d at 92 n. 17 (“The court maintains [the position articulated in 1992].”).

The defendants’ practices under the Disengagement Order, as the monitor found, were consistent with the terms of the Order. In fact, DMR had earlier closed two residential facilities, the Dever School in 1992 and the Belchertown School in 2002. The parties had agreed to the consent decree against the background of a 1991 policy announcement by then-Governor William Weld that several DMR facilities would be consolidated and that the Dever School would be closed within three years. *See generally Ricci II*, 781 F.Supp. at 827 & n. 3. So long as equal or better services remain available for each resident elsewhere, the closing

of one residential facility such as Fernald cannot itself constitute a violation of the Disengagement Order.

There is also no basis for a conclusion that the Commonwealth has failed to meet the conditions it agreed to meet as to how it goes about providing care to class members. Centrally, the Commonwealth is required to undertake an ISP process that outlines the services each individual class member needs. *See generally Ricci III*, 823 F.Supp. at 986-87 (Disengagement Order ¶ 2). Again, the record contains no evidence that DMR failed to discharge its ISP duties for any Fernald resident between 2003, when the policy was announced, and 2007. To the contrary, the monitor found that DMR had complied with its obligations in that period.

The district court nevertheless concluded that the Commonwealth's operation of the ISP process against the background of its policy decision to close Fernald constituted a systemic failure. The court reasoned that in announcing its intention to close Fernald, the Commonwealth "eviscerate[d] the opportunity for fully informed individualized oversight," "dismiss[ed] the benefit of hearing the voices and wishes of those most directly impacted," and "deprive[d] the DMR itself of valuable information, thereby undermining the efficacy of the ISP process." *Ricci IV*, 499 F.Supp.2d at 91. Given that the monitor found

and the court accepted that the transfer of 49 patients after the 2003 announcement fully complied with the Disengagement Order, it cannot follow that the fact of the announcement caused a systemic failure. Indeed, the 2003 announcement was not the first but one of several announcements made of a closing or phase-down of a DMR institution over a 15-year period. The pre-2003 announcements did not cause there to be systemic failures or damage the plaintiffs' ability adequately to participate in the ISP process, nor did the 2003 announcement. The monitor found there had been full compliance with the consent decree as to these earlier closings of facilities.

Further, the Disengagement Order requires the defendants to follow an ISP process but does not predetermine the placement which will result at the end of the ISP process. The Disengagement Order, by its terms, does not guarantee any class member any particular residential placement, nor does it guarantee that Fernald be maintained open so long as any particular resident prefers to remain there.

This, in turn, has several consequences. The removal of one of several available residential facilities which have been found to comply fully with the Disengagement Order cannot itself result in there being a violation of the ISP process. Further, the very nature of the ISP process itself contradicts the district court's conclusion. As the Commonwealth notes, the ISP

process focuses only on the services a resident is to receive; the ISP process does not specify where those services are to be delivered. *See generally* 115 Mass.Code Regs. 6.20-6.25; *cf. Ricci II*, 781 F.Supp. at 827 n. 4 (noting, in discussing ISP process for Dever residents, that “[r]ecommendation [s] as to residential and program placement are based on evaluation of the actual needs of the resident or client rather than on what facilities and programs are currently available”).

The Commonwealth also argues that its closing of Fernald could have no effect on the ISP process in the future because the Commonwealth and the class members entered into a stipulation, filed with the court on December 29, 2004, that included an agreement that:

The Department, its representatives, and employees shall not discuss alternative placement ... for individuals at Fernald during the team meeting convened to develop the individual's annual ISP. The annual ISP meeting shall be limited to the identification and recording of the individual's current needs and supports. The description of an individual's needs and supports as defined in the ISP shall be independent of any discussion regarding where the individual currently lives or what level or type of staffing exists there, and shall be based solely upon professional and direct care assessments done by persons in their assigned roles.

Stipulation at 1, *Ricci IV*, 499 F.Supp.2d 89 (D.Mass.2007) (Nos.72-0469-T, etc.) (citations omitted). As the Commonwealth points out, the stipulation creates even further distance between discussions of placement and the ISP process.

Further, the district court's injunction did not rest on the likelihood that the remaining Fernald residents systemically would be transferred into a location that was not "equal to or better" than Fernald. There is no basis in the record for such a conclusion. The monitor found that the other residential facilities were at least equal to Fernald. Rather, the court concluded that the systemic failure consisted of "[a]dministering [the ISP] process under the global declaration that Fernald will be closed." *Ricci IV*, 499 F.Supp.2d at 91. Under the Disengagement Order, the question of whether a transfer will result in an equal or better placement is separate from the question whether the Commonwealth has correctly implemented the ISP process. The section of the Disengagement Order which deals with transfers states:

Defendants shall not approve a transfer of any class member out of a state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent

community region) certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, *and that all ISP-recommended services for the individual's current needs as identified in the ISP are available at the new location.*

Ricci III, 823 F.Supp. at 987 (Disengagement Order ¶ 4) (emphasis added). Under the language of the Disengagement Order, a resident may not be transferred to a new location until the Superintendent certifies that the location can satisfactorily provide all ISP-recommended services. This *individualized* process, that the Commonwealth has followed, cannot constitute a “‘systemic failure’ to provide a compliant ISP process.” The legal premise for the court's conclusion was in error.

The plaintiff class members have expressed their concerns that the outcome of the ISP process for the remaining Fernald residents will not result in their receiving equal or better services.^{FN9} That determination, by its nature, must be made on an individual basis. The Disengagement Order and state regulations provide a procedure and a place where individual disputes about adequacy of the services resulting from the ISP process may be heard. *See generally* 104 Mass.Code Regs. 29.15. Again, the Disengagement Order commits these disputes to resolution in a state forum and under state law and thus provides no basis for federal court

intervention. A resident who is the subject of the ISP process may request a conference and an adjudicatory hearing, which includes procedural safeguards and the right to judicial review in the state Superior Court.

FN9. Plaintiff Wrentham Association argues that the record shows there was intimidation of residents. Neither the district court nor the monitor found any intimidation during the relevant period and the record does not sustain the accusation.

If in an individual case there is a failure to provide through the ISP process "an individualized and personalized analysis of each resident," a concern expressed by the district court, then the remedy is provided by state regulations, which inform the ISP process. *See generally* 115 Mass.Code Regs. 6.25. This concern then, does not satisfy the conditions for reopening the decree or warrant federal intervention in state proceedings.

The conditions precedent set forth in the Disengagement Order for the court to reopen the case have not been met and the court erred in concluding otherwise.

B. Whether There Was Authority Under the Modification Doctrine

In reopening the consent decree, the

district court did not rely on the doctrine that in limited circumstances, consent decrees in institutional reform cases may be modified. In fact, this theory was not advanced before the district court. Several of the briefs advance this modification rationale as an alternative rationale which they argue would support the court's reopening of the decree. Given the significance of this case, we address the question. We hold that the plaintiffs have not met and cannot meet their burden to establish that modification is warranted and that the court thus lacked jurisdiction to modify the consent decree.

In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992), the Supreme Court set forth the standards that apply when "a party seeks modification of a term of a consent decree that arguably relates to the vindication of a constitutional right." *Id.* at 383 n. 7, 112 S.Ct. 748. The district court can modify the decree only on a showing of a significant change in circumstances. *Id.* at 383, 112 S.Ct. 748. The party seeking modification has the burden of showing "a significant change either in factual conditions or in law." *Id.* at 384.

There is no justification in the modification rationale under *Rufo* to reopen the consent decree.^{FN10} There has been no significant change in factual circumstances. The parties, and the Disengagement Order,

recognized that the Commonwealth might choose to close any of the residential facilities, including Fernald. There has also been no significant change in law which would warrant reopening the decree. Indeed, the law has moved in a direction disfavoring institutionalization of residents. The Commonwealth cites *Olmstead* as recognizing that federal law now favors community placement of institutionalized individuals.^{FN11} In addition, the Commonwealth notes that the law of neighboring states, including Maine, New Hampshire, and Rhode Island, has moved away from institutionalization completely.

FN10. We do not need to reach the preliminary question of whether the modification doctrine can apply at all when the parties have in a consent decree defined the conditions for reopening.

FN11. Amici, Massachusetts Coalition of Families and Advocates for the Retarded, Inc. and Voice of the Retarded, Inc., filed a brief in this court in support of appellees that argues to the contrary that the core holding of *Olmstead* does not endorse deinstitutionalization but requires an individualized assessment that considers "the views of treatment professionals; the views of the affected individual; and state resources." Amici, the Association of Developmental Disabilities Providers of Massachusetts and others, filed a brief in

support of appellants. They argue that there has been a paradigm shift throughout the nation in favor of deinstitutionalization.

We note but have no need to address these different views.

C. Whether There Was Authority to Reopen Due to Constitutional Violations

The plaintiffs argue that there is a separate basis to be found in the Constitution, which would support the district court's assertion of jurisdiction. They argue that there has and will be a violation of the residents' due process rights. The district court wisely did not rely on this ground. There is no basis in the record for this assertion. The record is to the contrary

The plaintiffs allege that "a process that would permit the transfer of residents from Fernald without [allowing them] meaningful participation" violates principles of due process. But the record does not show that there has been a "lack of meaningful participation." The record provides no basis to infer, much less to demonstrate, that there will be a lack of meaningful participation. The monitor made no findings that DMR had prevented residents or guardians involved in transfers between 2003 and 2006 from participating meaningfully in discussions of their transfer. The findings are

that there was full compliance with the Commonwealth's obligations.

D. Whether Other Grounds Provided Authority to Reopen

This leaves only the attempt of the plaintiff class to recharacterize the district court's assertion of jurisdiction as an exercise of "ancillary jurisdiction." Plaintiff Wrentham Association makes a related argument that a court has "inherent authority" to enforce its own orders.^{FN12} Neither doctrine applies here.

FN12. The Wrentham Association argues that, in addition to its inherent authority, the district court explicitly retained jurisdiction here. Any jurisdiction retained in the Disengagement Order, however, could be activated only after certain conditions precedent, such as a showing of a systemic failure of the ISP process, were met.

"Ancillary jurisdiction" is a term with a specialized meaning, and the term has no application here. Nor does the court have "inherent authority" to revisit its Disengagement Order. In *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), the Court explained that ancillary jurisdiction can be used for two limited purposes: "(1) to permit disposition by a single court of claims that are, in varying respects and

degrees, factually interdependent ...; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-80, 114 S.Ct. 1673 (citations omitted). In discussing the second purpose, the Court noted that a district court may possess "inherent authority" to address violations of an order where it retains jurisdiction in a separate provision, but only when the order itself is violated. *See id.* at 380-81, 114 S.Ct. 1673. The Court found that neither power justified federal court jurisdiction to revisit a settlement agreement between two parties where the court order did not contain a provision retaining jurisdiction. *Kokkonen* thus stands for the proposition "that district courts enjoy no free-ranging 'ancillary' jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order." *Pigford v. Veneman*, 292 F.3d 918, 924 (D.C.Cir.2002) (citing *Kokkonen*, 511 U.S. at 381, 114 S.Ct. 1673). The district court's ancillary jurisdiction thus did not provide authority to reopen the Disengagement Order absent a showing, not sustainable here, that the terms of the Disengagement Order itself had been violated.

III.

The issue this court decides concerns the limits on the jurisdiction of the federal courts. We do not decide the issue of what path best serves the interests of the residents of Fernald

and the other parties who have a stake in this matter. People of good faith can and do passionately differ about the Commonwealth's intention to close the Fernald Center. We hold only that the district court lacked authority to reopen the consent decree in this case and that it lacked jurisdiction on that or any other basis to reopen and to enter the orders it did.

We *reverse* and direct entry of judgment dismissing with prejudice the claims plaintiffs have brought in this action. In doing so, we also recognize the able stewardship exercised by the district court over the years, which led to the improvement of conditions for the Fernald residents and to the landmark 1993 consent decree.

It is so ordered.

APPENDIX B

District Court Decision

United States District Court, D. Massachusetts.

Robert Simpson RICCI, et al., Plaintiffs,

v.

Robert L. OKIN, et al., Defendants.

Civil Action Nos. 72-0469-T, 75-5023-T, 74-2768-T, 75-5210-T, 75-3910-T.

Aug. 14, 2007.

MEMORANDUM

TAURO, District Judge.

Plaintiff Ricci class members raised allegations that Defendant Department of Mental Retardation ("DMR"), by and through its Commissioner, was failing to comply with this court's Final Order when it transferred Plaintiff class members out of the Walter E. Fernald Developmental Center ("Fernald"). In response, this court appointed U.S. Attorney Michael Sullivan as Court Monitor to investigate whether the DMR's past and prospective transfer of residents out of Fernald was in compliance with this court's 1993 Final Order, and applicable law.

When the court appointed the Court Monitor on February 8, 2006, it ordered all

transfers out of Fernald stayed. More than a year later, on March 6, 2007, the Court Monitor filed his report, a copy of which is attached as an Appendix. This court entered a March 7, 2007 order staying transfers from Fernald, pending consideration of the report and any objections.^{FN1}

FN1. That order was appropriate to prevent irreparable harm to the Plaintiff class while the court considered the matter. *See, e.g., Ricci v. Okin*, 978 F.2d 764, 767 (1st Cir.1992) (Breyer, J.) (“[W]e add that it would not likely benefit the appellants to obtain jurisdiction, for the practical, common sense considerations we have mentioned would balance heavily in favor of permitting a six-month procedurally-necessitated extension of the October 1986 Order's life.”).

The DMR has recently filed a *Motion to Dissolve Court's Injunction of February 8, 2006, Barring Transfers from the Fernald Developmental Center*. For the reasons expressed below, the court **ALLOWS** that motion, and vacates its earlier orders of February 8, 2006, and March 7, 2007. DMR may transfer class member residents from Fernald, subject to the following.

In addition to a complex web of federal and state statutes and regulations that protect the residents of Fernald, those who are *Ricci* class members have the right to demand that the

DMR "not approve a transfer of any class member out of a state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent community region) certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that all ISP-recommended services for the individual's current needs, as identified in the ISP, are available at the new location." FN2 That right, among others, is contained in the court's so-called Final Order, entered on May 25, 1993.

FN2. *Ricci v. Okin*, 823 F.Supp. 984, 987 (D.Mass.1993). "ISP" stands for Individual Service Plan. *Id.*

The Final Order returned to the DMR the authority to manage and oversee the Commonwealth's facilities. But, it reserved this court's right to intervene if "the defendants substantially fail to provide a state ISP process in compliance with this Order" or "if there is a systemic failure to provide services to class members as described in this Order." FN3

FN3. *Id.* at 988.

After more than a year of exhaustive and meticulous study,^{FN4} the Court Monitor concluded that the DMR had complied with the Final Order's requirement that transferred

residents obtain "equal or better services." FN5
The Court Monitor also concluded that "Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an 'equal or better' service outcome." FN6 This court shares in these conclusions.

FN4. The Court Monitor visited DMR intermediate care facilities and community residences throughout the Commonwealth, surveyed day programs, hired independent medical experts, scoured the medical and departmental records of the transferred individuals, and met with officials, guardians, and residents. *See generally*, The Monitor's Report, Paper # 158 (March 6, 2007).

FN5. *Id.* at 14.

FN6. *Id.* at 27.

The DMR objects to the Monitor's second conclusion arguing that, as a matter of federalism, subject matter jurisdiction, and state and federal law, this court should not and cannot decide for the DMR whether Fernald residents can receive equal or better services elsewhere. This court agrees that, in the first instance, it is the responsibility of the DMR to use the ISP process to assess the individual needs of each resident. But, considering the entire record of this case, the Court Monitor's

thorough investigation, as well as more than three decades of personal oversight of the case and the dozens of "views" by this court of the subject facilities,^{FN7} this court concludes that the Commonwealth's stated global policy judgment that Fernald should be closed ^{FN8} has damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis.

FN7. These views of the facilities in question are admissible evidence in this circuit. *United States v. Gray*, 199 F.3d 547, 550 (1st Cir.1999).

FN8. That the Commonwealth has such a plan is a fact established in the record and acknowledged by the DMR. *See* The Department of Mental Retardation's Response To: (1) the Report of United States Attorney Michael J. Sullivan; and (2) the Court's Order Show Cause Why an Injunction Should Not Enter, Paper # 198, p. 6 (May 31, 2007) ("On February 23, 2003, Governor Romney announced plans to close the FDC.").

Although the transfers that have taken place so far may have been in the best interests of residents who were able to obtain "equal or better services" elsewhere, the Court Monitor's report reaches a conclusion that should be apparent to anyone who has visited Fernald. For some Fernald residents, a transfer "could have

devastating effects that unravel years of positive, non-abusive behavior.”^{FN9} Of note, the Court Monitor emphasized the importance of simplicity, continuity, and consistency in the surroundings, activities, and caretakers that help residents live each day.^{FN10}

FN9. The Monitor's Report, Paper # 158, p. 24.

FN10. *Id.*

An essential function of the ISP process is to give residents and guardians a voice in important decisions.^{FN11} It is intended to provide an individual and personalized analysis of each resident. Administering this process under the global declaration that Fernald will be closed, however, eviscerates this opportunity for fully informed individualized oversight.^{FN12} To dismiss the benefit of hearing the voices and wishes of those most directly impacted invites the devastating effects about which the Monitor has warned. The DMR declaration not only disenfranchises the participants in the ISP process, it also deprives the DMR itself of valuable information, thereby undermining the efficacy of the ISP process. As a consequence, such administration of the ISP process amounts to a “systemic failure” to provide a compliant ISP process, within the meaning of the Final Order.^{FN13}

FN11. *See e.g.*, 115 Mass.Code Regs.

6.20(3)(a)(3) (2007).

FN12. See *Ricci v. Okin*, 781 F.Supp. 826, 827, n. 4 (D.Mass.1992) (describing the ISP process and explaining that “[r]ecommendation[s] as to residential and program placement are based on evaluation of the actual needs of the resident or client rather than on what facilities and programs are currently available”).

FN13. The Final Order does not define “systemic.” As this court oversaw entry of the Final Order, it is uniquely competent to declare that “systemic” simply was intended to have its plain dictionary meaning—“of or relating to a system.” Webster’s II New College Dictionary 1120 (2001). Accordingly, a systemic failure need not be catastrophic in and of itself. Rather, it may simply be a problem of any magnitude, which manifests itself on a system-wide basis, across a number of ISP processes.

To remedy this systemic failure, the court reasserts jurisdiction over this case,^{FN14} restores it to active status on this court’s docket, and enters the following order:

FN14. A district court has jurisdiction to enforce an order where the court retained such jurisdiction when it closed the case.

See Baella-Silva v. Hulsey, 454 F.3d 5, 10 (1st Cir.2006). This court did explicitly retain such jurisdiction in the Final Order. *Ricci*, 823 F.Supp. at 988.

Any further communication from Defendant Commonwealth of Massachusetts Department of Mental Retardation to Fernald residents and their guardians which solicits choices for further residential placement shall include Fernald among the options which residents and guardians may rank when expressing their preferences.^{FN15}

FN15. *See* Show Cause Order, Paper # 181 (May 9, 2007).

This order is consistent with controlling precedent.^{FN16} It does not mean that the Commonwealth may never close Fernald.^{FN17} It does mean, however, that the DMR must carefully assess the needs and wishes of each resident, and provide a genuine and meaningful opportunity for their guardians to participate in their placement decisions. The court is not dictating what the results of future ISP decision processes must be. It simply declares that starting an ISP discussion with the assumption that Fernald is not an available alternative for its residents is not acceptable.

FN16. The DMR asserts that entering such an order would run afoul of the Supreme Court's decision in *Olmstead v.*

Zimring, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999). There, the Court held that transfer out of a state institution and to a community setting "is in order when the State's treatment professionals have determined that community placement is appropriate, *the transfer from institutional care to a less restrictive setting is not opposed by the affected individual*, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Id.* at 587, 119 S.Ct. 2176 (emphasis added). But this court is not precluding such a transfer. To the contrary, this court is simply ensuring that the DMR use the ISP process to adequately assess whether the setting is appropriate and whether it "is not opposed by the affected individual."

FN17. As the DMR notes, the Consent Decrees entered by this court prior to the Final Order contemplate facility closure. *See Ricci*, 781 F.Supp. at 830 ("The Consent Decrees do not prohibit the possible closing of any facility. Indeed, if residents are properly placed into alternative settings, and a facility is no longer needed, this court will not interfere with its closure."). The court maintains this position. The purpose of today's order is not to interfere with closure, but to

make sure alternative placement decisions properly start with the needs and wishes of the individual resident, rather than an inflexible global closure policy.

The court believes that the Commonwealth's compliance with this order will remedy the systemic failure identified. Accordingly, the case may again be closed. All terms of the court's Final Order, in addition to the order referred to above, remain in effect. The DMR shall continue to have discretion to administer its programs and facilities, subject to the provisions of these orders.^{FN18}

FN18. The court would however, encourage the DMR and the Commonwealth to consider alternative proposals for Fernald, such as the one put forward by the Court Monitor at p. 25-26 of his report, which could use the existing capacity and resources available at Fernald to efficiently meet the needs of individuals, as well as the policy priorities of the Commonwealth, without causing the trauma and "devastating effects" that could result from transfers.

Consistent with the Final Order, this court will not review the results of individual ISP processes.^{FN19} But, should the laintiff class believe that a systemic failure once again exists, Plaintiffs may follow the procedures set forth in paragraph 7(c) of the Final Order to bring the

matter to the attention of the DMR, and eventually, back before this court.^{FN29}

FN19. *Ricci*, 823 F.Supp. at 988 (“Individual ISP disputes shall be enforced solely through the state ISP process.”).

FN20. *Id.*

AN ORDER WILL ISSUE.

APPENDIX C

District Court Subsequent Order

United States District Court, D. Massachusetts.

Robert Simpson RICCI, et al., Plaintiffs,

v.

Robert L. OKIN, et al., Defendants.

Civil Action Nos. 72-0469-T, 75-5023-T, 74-2768-T,
75-5210-T, 75-3910-T.

ORDER

After a Hearing held on February 26, 2008, this court hereby orders the following:

1. Plaintiffs' *Motion to Prohibit the Transfer of Residents From the Fernald Developmental Center to Other ICF/MRS and Community Residences Until the Pending Appeal of Ricci et al v. Patrick et al is Decided by the United States Court of Appeals for the First Circuit* [# 243] is DENIED.

2. Defendant Department of Mental Retardation's *Motion to Stay Further Proceedings* [# 245] is DENIED WITHOUT PREJUDICE.

3. Defendant Department of Mental Retardation's *Motion to Strike the Fernald Plaintiffs' Motion to Prohibit Transfer of FDC*

Residents Pending Appeal [# 247] is DENIED.

4. United States Attorney Michael J. Sullivan shall continue as Court Monitor with respect to the above-captioned matter.

a. Mr. Sullivan's responsibility is to advise the court whether the circumstances surrounding the February 13, 2008 transfer of A.T., a 91-year-old, legally blind, hearing impaired, mentally retarded woman, from the Fernald Developmental Center to another facility, complied with the August 14, 2007 Memorandum [# 219] and accompanying Order [# 220] of this court.

b. The Department of Mental Retardation shall grant Mr. Sullivan access to all records and information that may be relevant to his inquiry. Any dispute as to the need for such records, or the need for any protective order, shall be brought to the attention of this court for resolution.

c. Plaintiffs' oral *Motion to Expand the Scope of the United States Attorney's Inquiry into All of the Transfers from Fernald that Occurred After May 14, 2007*, raised in open court at the Hearing, is DENIED.

IT IS SO ORDERED.

APPENDIX D

District Court Disengagement Order

United States District Court, D. Massachusetts.

Robert Simpson RICCI, et al., Plaintiffs,

v.

Robert L. OKIN, M.D., et al., Defendants.

**Civ. A. Nos. 72-0469-T, 74-2768-T, 75-3910-T,
75-5023-T and 75-5210-T.**

May 25, 1993.

MEMORANDUM

TAURO, Chief Judge.

Twenty-one years ago, I made my first trip to Belchertown, to see for myself the conditions alleged in a class action filed on behalf of the residents there.

To put that time frame in some perspective, I point out that the law clerk who accompanied me that day, Mark Brodin, is now a tenured professor at the Boston College Law School—a rookie Boston lawyer named Bill Weld had passed the bar less than two years earlier—and Kris Brown, the law clerk now working on these cases, was four years old.

Similar actions were later filed on behalf

of the residents of Fernald, Monson, Dever and Wrentham.^{FN*} I went to see them all, and the sights, sounds, smells and generally deplorable conditions I witnessed are as vivid in my mind today as they were those many years ago.

FN* For a detailed exposition of the history of these cases, see *Ricci v. Okin*, 978 F.2d 764 (1st Cir.1992); *Massachusetts Ass'n for Retarded Citizens v. King*, 668 F.2d 602 (1st Cir.1981); *Massachusetts Ass'n for Retarded Citizens v. King*, 643 F.2d 899 (1st Cir.1981); *Ricci v. Okin*, 781 F.Supp. 826 (D.Mass.1992); *Ricci v. Callahan*, 646 F.Supp. 378 (D.Mass.1986); *Ricci v. Callahan*, 576 F.Supp. 415 (D.Mass.1983); *Ricci v. Callahan*, 97 F.R.D. 737 (D.Mass.1983); *Ricci v. Okin*, 537 F.Supp. 817 (D.Mass.1982); Esther Scott, Judge Tauro and Care of the Retarded in Massachusetts (1987) (unpublished case program, Kennedy School of Government, Harvard University).

But, thanks to the healthy tenacity and persistence of the parents, friends and counsel of people with mental retardation-the enlightened leadership of responsible state and federal officials, and the oversight of the Office of Quality Assurance and predecessor Court Monitors-those initial inspection tours became the first steps in a process that has taken people with mental retardation from the snake pit,

human warehouse environment of two decades ago, to the point where Massachusetts now has a system of care and habilitation that is probably second to none anywhere in the world.

For the past two decades, literally thousands of hours have been devoted to fashioning a comprehensive remedial program that has included multi-million dollar capital improvements, establishment of a responsible program of community placement, as well as significant staffing increases geared to meeting the individual service plans and overall needs of those with mental retardation.

The result is that, working together, we have created an environment for persons with mental retardation that is now characterized by human dignity and opportunity for growth. And we have done so in a way that consistently ensured a full measure of value for every tax dollar spent.

Despite this progress, these institutions and the related programs are, of course, not perfect. More needs to be done. And, most important, all concerned, both in the private and governmental sectors, need to be ever vigilant that we do not permit any erosion of the significant progress that has been made.

Given this progress, and the demonstrated good will and dedication of Governor Weld to the mission of safeguarding the health, safety and

well-being of people with mental retardation, I am today signing a comprehensive Order closing the federal court's oversight of these cases.

A key factor in my decision to do so is Governor Weld's commitment to make permanent the historic improvements that have been achieved during the past twenty years—a commitment manifested and memorialized by the Executive Order he is issuing today, creating the Governor's Commission on Mental Retardation.

This Commission will be an independent citizen oversight body whose multi-faceted mandate and authority will include monitoring the quality and effectiveness of the Commonwealth's programs of services designed to address the wide variety of needs of people with mental retardation.

The nine members of the Commission will be selected by the Governor. Three of these members will be nominated by the existing Advisory Panel of the Office of Quality Assurance, thereby providing significant input from those who have been so intimately involved with these cases over the years.

The Commission will be served by a full-time Administrator appointed by the Governor. The Administrator will be a person who has demonstrated knowledge and experience with respect to quality assurance in the delivery of

services to people with mental retardation.

The Commission will have access to all relevant information concerning people with mental retardation. It will serve as an ombudsman to resolve disputes, and it will provide a visible and credible forum to ensure that the Commonwealth fully complies with its obligations to its citizens with mental retardation.

The Commission will work cooperatively with the Department of Mental Retardation, and will serve as a source of valuable advice to the Commissioner and to the Governor with respect to issues affecting the quality of care for persons with mental retardation.

This independent citizen task force, having oversight responsibility for monitoring quality assurance, is the first of its type in the nation. And Governor Weld is to be commended for his foresight and sensitivity in creating this atmosphere of citizen inclusion with respect to the critical responsibility for monitoring the efforts of the Department of Mental Retardation.

I know that Governor Weld will choose the Commission members and the Administrator with great care. To his appointees I repeat something I said in 1982:

The retarded have no potent political constituency. They must rely on the good

will of those of us more fortunate than they, and the Constitution which controls the manner in which all of us must meet our varied responsibilities.

Ricci v. Okin, 537 F.Supp. 817, 836 (D.Mass.1982).

My hope is that those words will serve as something of a standard for the Commission members and the Administrator as they assume this important public trust.

An Order will issue.

ORDER

After notice and hearing, and with the consent of the parties, it is hereby ORDERED:

1. This Order supplants and replaces each of the consent decrees and all orders of the court in these matters. All such consent decrees and outstanding orders are hereby vacated and dissolved. These five consolidated cases shall be and hereby are closed and removed from the court's active docket. Any action to enforce the rights of the plaintiff classes may be brought before the court only pursuant to the terms of paragraph 7 below.

2. Defendants shall continue to provide services to the members of the plaintiff class as set forth in this paragraph.

a. Defendants shall substantially provide services to each class member on a lifetime basis. The specific services to be provided to each class member ^{FN1} to meet this obligation, and defining this obligation, shall be set forth in an Individual Service Plan ("ISP") that details each class member's capabilities and needs for services, pursuant to the regulations governing the preparation of ISP's, as currently set forth in 104 CMR 20, *et seq.* (the "ISP Regulations").^{FN2} Such services shall include, as appropriate for the person, residential programs; day programs; recreational and leisure time activities; medical, psychological, dental and health-related professional services; respite care and crisis intervention services; support and generic services, such as guardianship and adaptive equipment services; and transportation services.

FN1. The plaintiff class will be defined as those individuals who have been identified in the Class Member Identification List issued as of April 30, 1993, regardless of their current place or residence, or any person who, on or after April 30, 1993, has resided at a state school during more than 30 consecutive days or for more than 60 days during any twelve-month period. Defendants shall maintain a mechanism for keeping track of the identities and locations of current class members, and the occurrence and history of transfers, which information shall be available to

plaintiffs' counsel. During the first three years following issuance of this Order, defendants shall also transmit notices of the transfer of any class member to a designated representative from that individual's original class. Additionally, notice shall be sent to a representative of the Massachusetts Association of Retarded Citizens of the transfer of any class member from the original Dever and Wrentham classes.

As of this date, admissions to the state schools are closed; however nothing in this Order shall preclude defendants in the future from adopting a different admissions policy, or from modifying the current policy on admissions.

For purposes of this Order, "State School" shall include Belchertown, Dever, Fernald and Wrentham State Schools and Monson Developmental Center.

FN2. These regulations shall guarantee that each class member be provided with the least restrictive, most normal, appropriate residential environment, together with the most appropriate treatment, training, and support services suited to that person's individual needs.

b. Defendants shall not seek to amend,

revise, or otherwise modify the ISP Regulations as they affect class members except upon 60 days written notice to plaintiffs' counsel, with an opportunity for plaintiffs to comment upon the proposed changes. Any amendments must leave in place a process that is at least the substantial equivalent of the regulations currently set forth in 104 CMR 20, *et seq.*, with regard to the definition of the ISP, the individualized nature of the ISP, the existence of an appeal process, and the principles contained in footnotes 2 and 3 herein.

c. Sufficient adequately trained and experienced personnel, as reasonably determined by the Department of Mental Retardation based on professional judgment, shall be available to substantially meet the needs set forth in each class member's ISP.

d. Defendants shall maintain certification of state schools under federal Title XIX of the Social Security Act, 42 U.S.C. §§ 1396, *et seq.*, and maintain compliance with the Department of Mental Retardation's Title XIX obligations with respect to services in the community, for as long as the state participates in those programs for each facility or service as to which the state receives Title XIX funds.

e. Within nine months of the date of this Order, defendants shall enter into an agreement with contracted consultant retardation professionals or with a nationally recognized

evaluation group to review community programs on a periodic basis.

3. a. Defendants shall continue to use the Single Standard Methodology for staffing state schools for five months, or until the implementation of an alternative staffing plan pursuant to the procedures set forth in subparagraph 3(b) below, whichever is later.

b. If the defendants wish to discontinue use of the Single Standard Methodology, defendants shall provide to the Governor's Commission on Mental Retardation for its review during at least one meeting an alternative staffing plan that will assure the presence of adequate numbers of appropriately trained staff at each state school sufficient to meet the needs of the individuals who continue to reside there. This alternative staffing plan shall be formulated by the Department of Mental Retardation based on its reasonable, professional judgment and may or may not utilize specific ratios for staff.

4. Defendants shall not approve a transfer of any class member out of a state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent community region) certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that

all ISP-recommended services for the individual's current needs as identified in the ISP are available at the new location.

5. Except as set forth in other paragraphs of this Order, nothing in this Order is intended to detract from or limit the discretion of the defendants in developing and improving programs, managing and determining the personnel and budget of the Department of Mental Retardation and other state agencies, implementing innovative services, improving quality enhancement and dispute-resolution mechanisms, or allocating its resources to ensure equitable treatment of its citizens.

6. Defendants shall continue to seek to improve, and shall not undermine, the progress achieved during the period of this litigation by:

a. Maintaining and implementing the basic principles of the ISP.^{FN3}

FN3. These principles, currently in Department of Mental Retardation regulations, are "(1) human dignity, (2) humane and adequate care and treatment, (3) self-determination and freedom of choice to the person's fullest capacity, (4) the opportunity to live and receive services in the least restrictive and most normal setting possible, (5) the opportunity to undergo normal developmental experiences, even though

such experiences may entail an element of risk, provided however that the person's safety and well-being shall not be unreasonably jeopardized, and (6) the opportunity to engage in activities and styles of living which encourage and maintain the integration of the client in the community through individualized social and physical environments."

b. Exerting their best efforts to maintain and secure sufficient funds to meet the needs of class members under this Order. The defendants shall be determined to have met their obligation under this subparagraph if the defendants have secured and maintained an annual appropriation for the Department of Mental Retardation at least equal to the total gross amount of the actual appropriations for Fiscal Year 1993.^{FN4}

FN4. This amount shall be set as follows: Within 14 days of the final appropriation for the Department of Mental Retardation for Fiscal Year 1993, the defendants shall file with the court a certification of the total gross amount of actual appropriations for the Department of Mental Retardation for Fiscal Year 1993 which shall constitute an appendix to this Order and shall be incorporated herein by reference.

7. a. If the defendants substantially fail to provide a state ISP process in compliance with

this Order, or if there is a systemic failure to provide services to class members as described in this Order, the plaintiffs may seek enforcement of the Order pursuant to this paragraph. Individual ISP disputes shall be enforced solely through the state ISP process.

b. Nothing in this Order shall make state law (including but not limited to the ISP regulations) enforceable in federal court, but claims of a failure to provide an ISP process in compliance with this Order or claims of systemic failure to provide ISP services required by this Order may be enforced in this court, even if such claims also state a violation of state law.

c. Should the plaintiff class believe that the defendants are not in substantial compliance with this Order with regard to systemic issues, plaintiffs may seek to reopen this case and to restore this case to the active docket and to move for enforcement of this Order only after the following steps have occurred: ^{FN5} (1) plaintiffs have given written notice to defendants of the alleged non-compliance, including the facts alleged and the provision of the Order involved; (2) defendants have been provided with 30 days to review and respond to plaintiffs' notice, and to inform plaintiffs of any proposed plan of correction; (3) plaintiffs and defendants (or their respective counsel) have met personally at least twice to discuss and seek to resolve any remaining dispute under the notice. The court shall have jurisdiction to enforce the provisions

of this Order pursuant to this paragraph, which shall be the exclusive means of enforcing this Order.

FN5. The procedures required by this subparagraph will apply except in a situation where serious irreparable harm would result if all the requirements were met; in such a situation, plaintiffs shall give the maximum practical notice and the parties shall comply with all the requirements to the extent possible, given the urgency of the situation.

d. The matters which may be raised under subparagraph 7(a) above are assertions of future systemic violations of this Order. Nothing in this paragraph 7 shall be construed to prevent a class member from bringing an independent action in the event that the individual's grievances have not been remedied through existing state procedures.

e. Plaintiffs may not seek to reopen this case based solely on facts known by them as of the date of this Order. Plaintiffs may, however, use existing facts in connection with any assertions of future systemic violations of this Order.

8. This Order shall take effect upon written notification to the court by the Governor that he has issued the Executive Order set forth in Appendix A, which is attached hereto and

incorporated herein, and that all members of the Governor's Commission on Mental Retardation have been sworn and the Administrator has been appointed.^{FN6} The Advisory Panel of the Office of Quality Assurance shall submit its list of Commission member nominees to the Governor within 30 days of the signing of this Order.

FN6. Once this Order takes effect, the Office of Quality Assurance shall limit its activities to those necessary to transfer its files to the Governor's Commission. It is understood that the Office shall cease all operations upon the appointment of the Administrator of the Commission, or on June 30, 1993, whichever event later occurs.

9. Defendants shall place the following information describing the rights and services under this Order in the permanent record of each class member, shall retain such information on record for so long as the class member is alive, and shall seek to enter such information in the class member's file maintained by all providers of services to class members (and, within one year, by contract require such entry by providers):

a. designation of class membership;

b. notation that class membership results in rights and services guaranteed by this Order, and a summary of those rights; and

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c. the name, address and telephone number of plaintiffs' counsel, various advocacy organizations, the Department of Mental Retardation, and the Governor's Commission.

The above information shall be reviewed with each class member at that individual's next scheduled ISP meeting following the effective date of this Order.

IT IS SO ORDERED.

APPENDIX A

THE COMMONWEALTH OF
MASSACHUSETTS

EXECUTIVE DEPARTMENT

STATE HOUSE BOSTON 02133

(617) 727-3600

BY HIS EXCELLENCY

WILLIAM F. WELD

GOVERNOR

EXECUTIVE ORDER NO. 356

*GOVERNOR'S COMMISSION ON MENTAL
RETARDATION*

WHEREAS, it is the responsibility of the Commonwealth to safeguard the health, safety and well-being of its citizens with mental retardation; and

WHEREAS, it is the responsibility of the Commonwealth to ensure that the system of services for people with mental retardation never regresses to the deplorable and degrading conditions of the past; and

WHEREAS, the Commonwealth desires to make permanent the historic improvements in the care of people with mental retardation that were brought about by those who found the conditions of the past utterly unacceptable; and

WHEREAS, the Commonwealth recognizes the value inherent in its receiving ideas and maintaining communication with family members, advocates, public officials, and other members of the public interested in enhancing the well-being of people with mental retardation; and

WHEREAS, it is important that people with mental retardation, their families and the public, be provided with a forum for discussion and resolution of disputes that may otherwise not be addressed by the Department of Mental Retardation pursuant to its statutory responsibilities; and

WHEREAS, it is the responsibility of the Commonwealth to educate the general public as to the potential of people with mental retardation to make meaningful contributions to the communities in which they reside; and

WHEREAS, people with mental retardation must have opportunities to make choices with respect to their future, and to influence the course of public policy as it affects such choices; and

WHEREAS, presence and participation in community life are valued aspirations for people with mental retardation, as they are for all citizens of the Commonwealth; and

WHEREAS, the Commonwealth's network of individualized services designed to address the wide variety of needs of people with mental retardation must be continually evaluated and monitored to ensure its quality and effectiveness;

NOW, THEREFORE, I, William F. Weld, Governor of the Commonwealth, by virtue of the authority vested in me as Supreme Executive Magistrate, do hereby establish the Governor's Commission on Mental Retardation, as follows:

ARTICLE I. *Purpose and Scope of Commission*

1.1 The purpose of the Commission shall be:

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(a) to monitor the quality and effectiveness of the Commonwealth's program of services designed to address the wide variety of needs of people with mental retardation;

(b) to discuss and resolve, to the extent practicable, individual and systemic disputes raised by individuals with mental retardation, their families or guardians, for which no other forum exists, or which have not been adequately resolved by existing avenues of redress;

(c) to provide a visible and credible forum for the review of public policy as it affects persons with mental retardation, and to ensure that the Commonwealth fully complies with its obligations to meet their special needs;

(d) to inform the public, as well as those at the highest levels of state government, whenever the Commonwealth has failed in its obligations to its citizens with mental retardation;

(e) to work cooperatively with the Department of Mental Retardation in an effort to support the Department's mission to serve people with mental retardation, and to act as an advocate for the Department, with the public and those within state government, for the purpose of ensuring the quality and effectiveness of Department programs designed to achieve its mission; and

(f) to support and review implementation of the

recommendations of the Commission made pursuant to its responsibilities under 1.1(b) above, after discussion with and receipt of information from the Commissioner of Mental Retardation and other concerned individuals and organizations.

ARTICLE II. *Membership and Structure of Commission*

2.1 The Commission shall consist of nine (9) members appointed by the Governor. Members will be appointed for a term of three (3) years.

2.2 At least three members shall be appointed from a list of not less than twelve (12) nominees submitted to the Governor by the Advisory Panel of the Office of Quality Assurance.

2.3 The Governor shall appoint a Chair of the Commission from among its members.

2.4 Members of the Commission shall consist of persons with demonstrated interest, experience, and expertise in mental retardation. No employee of the Department of Mental Retardation, or its contractors, may be a member of the Commission. Members shall be considered to be special state employees and subject to the provisions of General Laws ch. 268A.

2.5 Members of the Commission shall

serve without compensation, but shall be reimbursed for necessary expenses incurred in the performance of their duties.

2.6 Members of the Commission may be removed by the Governor for good cause shown, including but not limited to failure to attend Commission meetings, as evidenced by absence from three or more Commission meetings in any one calendar year. Voting by proxy or absentee ballot shall not be permitted at Commission meetings, or otherwise in the work of the Commission.

2.7 Vacancies in the membership of the Commission shall be filled promptly by the Governor. Whenever a vacancy occurs in any of the three positions originally appointed from the list submitted by the Advisory Panel of the Office of Quality Assurance, the Governor shall appoint a successor from a list of four (4) candidates submitted by a nominating committee established for the express purpose of filling such vacancies. This nominating committee shall consist of six (6) members and shall be constituted as follows: one representative from each of the four state school parents associations (Dever, Fernald, Monson, Wrentham), one representative from Advocacy Network, Inc., and one representative from the Massachusetts Association for Retarded Citizens.

2.8 There shall be a full-time Administrator of the Commission who shall be

selected by the Governor. The Administrator shall be an employee of the Commonwealth, and shall be compensated for the performance of his or her duties. The Administrator shall have full knowledge of the mental retardation service system and agencies delivering such service and have demonstrated experience in administration and quality assurance. The Administrator shall hold no other public office.

ARTICLE III. *Powers and Duties of Commission Generally*

3.1 The Commission shall adopt such internal procedures as are appropriate for the effective performance of its duties. Decisions of the Commission shall be by majority vote of those present, with a quorum of seven members present required for such decisions. Any procedural issues that may arise during Commission meetings shall be resolved by reference to Robert's Rules of Order.

3.2 The Commission shall hold public hearings, in Boston and at such other locations as it shall determine, from time to time, but in no event less than semi-annually. The subject of such hearings shall include, but shall not be limited to: the quality of the health, safety and well-being of the Commonwealth's citizens with mental retardation; the quality of publicly-funded services available to such citizens; and the extent to which the private sector and the community at large provide opportunities for

persons with mental retardation. The results of such hearings shall be reported to the Commissioner of the Department of Mental Retardation, the Secretary of the Executive Office of Health and Human Services, and the Governor.

3.3 The Commission, the Administrator, or any person they may designate, shall have access at any and all reasonable times to any retardation facility, residence, program, or part thereof, and to all relevant records, reports, materials, and employees, in order to allow them to enhance their appreciation of the needs of persons with mental retardation, and to monitor the quality with which such needs are being met.

3.4 The Commission may make recommendations to the Governor as to how the quality of life of citizens with mental retardation may be improved by legislation and/or regulations.

3.5 The Commission, and/or the Administrator, may, from time to time, issue reports on matters affecting the health, safety and well-being of persons with mental retardation, including reports on the results of activities conducted in accordance with 3.3 above, and may make recommendations for corrective action in response to findings concerning those activities, as well as to complaints that have been reviewed in accordance with Article IV, below. The agencies

to which these reports and/or recommendations are directed shall respond to the Commission within a reasonable time frame.

ARTICLE IV. *Commission's Powers to Serve as Ombudsman and to Resolve Disputes*

4.1 (a) The Administrator, acting on behalf of the Commission, shall be empowered to receive complaints concerning the provision of services to persons with mental retardation that have not been resolved, within a reasonable time, at the local level, or at the level of the Department of Mental Retardation. Prior to presenting a matter for review by the Commission, the Administrator shall consider whether the complaint can be resolved through conciliation. If so, the Administrator shall implement conciliation discussions. In every case, the Administrator shall ensure that the Department of Mental Retardation has had a full opportunity to resolve the matter prior to presentation of the matter to the Commission.

(b) The Commission shall not, in the first instance, consider complaints concerning matters that should be addressed pursuant to: (i) statute or regulations concerning Individual Service Plans; (ii) regulations requiring complaint investigation by the Department; (iii) statutes or regulations governing abuse or neglect of persons with mental retardation; or (iv) any matter for which there exists another mechanism instituted by law for the purpose of

addressing the complaint. The Administrator, however, may monitor the processing of such complaints to determine whether the complainant has made full use of existing procedures, and if not, fully inform complainant of such procedures. If the matter has not been resolved pursuant to the procedures described in (i) through (iv) above, or the Administrator's conciliation effort has not resolved the matter, then the Administrator may refer the complaint to the Commission for its review.

(c) The Commission shall not consider complaints from employees of the Department of Mental Retardation when the matter complained of is the proper subject of union grievance proceedings, civil service laws, or other processes designed to deal with conditions of employment.

4.2 In responding to a complaint, or in the performance of their duties as outlined in the preceding Articles, the Commission, its Administrator, or their designee may request and obtain such information from agencies of the Commonwealth as is necessary to perform their duties, unless otherwise prohibited by law,^{FN1} including:

FN1. The Department of Mental Retardation has determined that disclosure to the Commission of otherwise confidential information about its consumers shall be in the consumers' best interest and therefore shall not be

prohibited by law.

(a) information, data, and reports generated by the existing quality assurance mechanism of the Department of Mental Retardation;

(b) information, data, and reports generated by the Health Care Financing Administration or other federal or state agencies pursuant to Title XIX or other federal statutes or regulations; and

(c) information, data, and reports generated as a result of investigations conducted by the Department of Mental Retardation, the Department of Public Health, the Disabled Persons Protection Commission, the Inspector General's Office, or any other state agency.

4.3 The Commission, its Administrator, or their designee may also:

(a) visit, inspect, and make firsthand appraisals of mental retardation facilities, residences, and programs, with specific attention to the safety, security, and quality of care provided;

(b) evaluate information and reports from consumers, their families or representatives, or others, regarding the effectiveness and adequacy of services and quality assurance mechanisms; and

(c) monitor facilities, residences, and programs for the purpose of determining whether problems that have been the subject of past complaints have been rectified.

4.4 The Commission and its designees shall be bound by any limitations on the use or release of information imposed by law upon the party furnishing such information to the Commission and its designees.

4.5 The Commission shall be empowered to mediate and to recommend resolution of disputes between the Department of Mental Retardation and those it serves. In such cases, the Commission may act only after it has, by majority vote, directed the Administrator to bring the matter to the attention of the Commissioner of the Department of Mental Retardation for a response, and has determined that no adequate remedy has been forthcoming to address the matter in dispute.

4.6 If the Department of Mental Retardation fails to implement a mediated agreement or recommended resolution reached pursuant to 4.1 above, after notice to the Commissioner who shall be provided with an opportunity to respond, the Commission is authorized to make recommendations directly to the Governor concerning the matter at issue. Such recommendations to the Governor shall be public information.

4.7 The Administrator shall coordinate the mediation and dispute resolution functions of the Commission. Twice annually, the Administrator shall issue an analysis of cases brought to the Commission's attention. Such analysis shall be provided by the Commission to the Governor, the Secretary of the Executive Office of Health and Human Services, and to the Commissioner of the Department of Mental Retardation. This analysis shall be public information.

ARTICLE V. *Miscellaneous*

5.1 To maximize its capability of realizing its mission, the Commission shall be located in the office of the Governor, and shall report directly to the Governor.

5.2 The Commission and the Administrator shall be provided with staff, secretarial support and other resources necessary to meet their responsibilities. A first Annual Budget for these purposes is attached as an appendix.

5.3 The quality assurance processes of the Department of Mental Retardation and the Commission shall work collaboratively for the benefit of people with mental retardation.

5.4 The Commission, including the Administrator and its staff, shall exist for three years commencing from the date all members

and the Administrator are fully sworn. Six months prior to the end of this three year term, the Commission, in consultation with the Administrator, shall make a recommendation to the Governor as to whether the continued existence of the Commission is advisable to assure quality of services and protection of rights for people with mental retardation.

Given at the Executive Chamber in Boston this 25 day of May in the year of our Lord one thousand nine hundred and ninety-three.

/s/ William F. Weld

William F. Weld, Governor

Commonwealth of Massachusetts

/s/ Michael Joseph Connolly

Michael Joseph Connolly

Secretary of the Commonwealth

GOD SAVE THE COMMONWEALTH OF
MASSACHUSETTS

EXHIBIT A

First Year Budget

This document describes the total first year budget that will be requested for the

Commission on Mental Retardation, the staffing and other expenses which it would cover, and the principles which will guide the implementation of the budget.

Amount of Budget. The first year budget for the Commission on Mental Retardation will be \$200,000. To the extent this amount is insufficient to fully fund the non-personnel requirements of the Commission, the Executive Office of Health and Human Services, the Department of Mental Retardation, and other appropriate state agencies shall provide additional funds or support as are needed to allow for travel, equipment (including computer equipment and programs), supplies, telephones, and photocopying. Any such additional support shall be provided in accordance with applicable state laws and procedures.

Adjustments to Budget. It is recognized that the needs of the Commission may change, based on its experience in the first year. For the second and subsequent years, the amount to be requested from the Legislature will be re-evaluated and adjusted as necessary, taking into consideration any recommendations of the Commission, the actual and anticipated workload of the staff, and to assure the accomplishment of the Commission's purposes. Any comments or suggestions from the Plaintiffs' counsel will be considered as well.

Staffing. The professional staff of the

Commission will consist of from two to four professional staff, plus support staff. Professionals must have knowledge of the mental retardation service system and related agencies, and demonstrated experience in the field of mental retardation. Also, it is expected that graduate and undergraduate students in intern and extern programs will be attracted through formal arrangements with institutions of higher learning to assist the professional staff. The first year would begin with at least two professional staff (the Administrator and an Assistant Administrator are anticipated), both full-time, with a full-time secretary. The number and nature of the staff will depend on the qualifications, and salary needs, of the persons hired, considered together with the non-personnel needs of the Commission. Benefits would be approximately 28% of the total salary amounts.

Transition. Orientation and transition briefings and assistance will be provided to the professional staff, and to the Commission, by the Department of Mental Retardation and, it is expected, by the Office of Quality Assurance. No cost would be incurred for this transitional assistance.

Commission Member Expenses. The minimum cost expected for Commission members for reimbursement of expenses is \$5,832. This would include \$120 per member for parking (\$10/member x 12 potential monthly

meetings): \$528 per member for travel (200 miles @ \$.22/mile x 12 meetings). Total: \$648 per member x 9 members = \$5,832.

Other Costs. *Staff travel* is expected to be in the range of \$1,960 (assuming 9,000 miles at \$.22 per mile). *Office space* will be sought in an existing state-owned building so that space costs may be avoided. *Equipment and supplies* are expected to be in the range of \$6,300. Computer equipment and appropriate computer programs will be provided. Additional costs would be incurred for telephone and photocopy, as well as for transcription for any hearings or formal proceedings: these costs would likely total in the \$7,000 to \$10,000 range. Costs for *consultants* to the Commission would be charged to the Commission budget or, when appropriate and agreed to, might be shared with DMR or other state agencies.

Cooperation With Other State Agencies.

As the Executive Order states, Par. 1.1(e), the Commission is expected to "work cooperatively with the Department of Mental Retardation ... in support of the Department's mission ... and act as an advocate for the Department, with the public and those within state government ...". To that end, it is expected that the Governor's Office, EOHHS, DMR and other agencies will join with the Commission to assist it to maximize the effectiveness of its work and its budget.

App. 80

APPENDIX E

Amended Judgment First Circuit Court of Appeals

**United States Court of Appeals, First Circuit.
Robert Simpson RICCI, et al., Plaintiffs,
Appellees,**

v.

**Deval L. PATRICK, in his capacity as Governor
of the Commonwealth of Massachusetts, et al.,
Defendants, Appellants.**

No. 07-2522,

**Massachusetts Association for Retarded
Citizens, Inc., a/k/a Arc/Massachusetts, Inc., et
al., Plaintiffs, Appellants,
Disability Law Center, Inc., Intervenor,
Appellant,**

v.

**Deval L. Patrick, in his capacity as Governor of
the Commonwealth of Massachusetts, et al.,
Defendants, Appellants.**

No. 07-2523.

AMENDED JUDGMENT

Entered: November 18, 2008

**This cause came on to be heard on appeal
from the United States District Court for the**

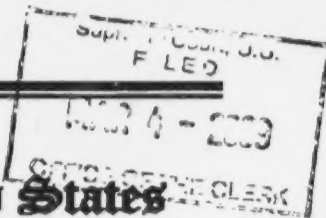
District of Massachusetts and was argued by counsel.

The orders of the District Court dated August 14, 2007 and February 27, 2008 are reversed and we direct entry of judgment that all claims made which resulted in the issuance of those orders be dismissed with prejudice to their renewal in federal court proceedings. The 1993 Disengagement Order remains in full force and effect.

By the court

/s/ Richard Cushing Donovan, Clerk

4
No. 08-971



IN THE
Supreme Court of the United States

ROBERT SIMPSON RICCI, *et al.*,
Petitioners,

v.

DEVAL L. PATRICK, in His Capacity as Governor of the
Commonwealth of Massachusetts, *et al.*,
Respondents,

MASSACHUSETTS ASSOCIATION FOR RETARDED
CITIZENS, INC., a/k/a Arc/Massachusetts, Inc.,
Respondent,

DISABILITY LAW CENTER, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

**RESPONDENTS MASSACHUSETTS
ASSOCIATION FOR RETARDED CITIZENS
AND THE DISABILITY LAW CENTER'S
BRIEF IN OPPOSITION**

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QUESTIONS PRESENTED

- I. Did the petitioners waive the issue of the standard of review, when they neither argued that that the standard for review of the district court's legal conclusions should be anything other than de novo, when they never even suggested to the First Circuit that it consider the deferential standard that they propose here, and when they failed to cite a single case to the First Circuit that they rely upon in their Petition?
- II. Is there a conflict among the courts of appeals that requires resolution by this Court, when every circuit court applies a de novo standard in reviewing a district court's interpretation of state law, or of state law requirements that are incorporated in a consent decree, as the First Circuit did here?
- III. Is there a conflict among the courts of appeals that requires resolution by this Court, when every circuit court applies a de novo standard in reviewing a district court's interpretation of the unambiguous provisions of a consent decree?

QUESTIONS PRESENTED—Continued

- IV. Where the parties provided in their consent decree that the State had discretion to allocate its resources and to close its public institutions, did the First Circuit properly conclude that the district court lacked jurisdiction to reopen a thirty-five-year-old case simply because the State decided to close one of its state-operated facilities, and despite the absence of any factual findings supporting a violation of federal law or of any provision of a fifteen-year-old disengagement order?

PARTIES TO THE PROCEEDING BELOW

The Petition for Writ of Certiorari incorrectly lists the Association for Retarded Citizens of Massachusetts, Inc., a plaintiff below, and the intervenor Disability Law Center, Inc. as petitioners. The Association for Retarded Citizens of Massachusetts, Inc. and the Disability Law Center, Inc. were aligned with the State respondents in opposing the district court's decision to reopen this thirty-five-year-old case and appealing the district court's order to the First Circuit. The Association for Retarded Citizens of Massachusetts, Inc. and the Disability Law Center, Inc. oppose the Petition and are among the respondents in this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent, Massachusetts Association for Retarded Citizens, Inc., states that its name has changed to Arc Massachusetts, Inc. and that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and is not a publicly held corporation that issues stock. It has no parent corporation.

Respondent, Disability Law Center, Inc., states that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and is not a publicly held corporation that issues stock. It has no parent corporation.



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IN THE
Supreme Court of the United States

No. 08-971

ROBERT SIMPSON RICCI, *et al.*,
Petitioners,

v.

DEVAL L. PATRICK, in His Capacity as Governor of the
Commonwealth of Massachusetts, *et al.*,
Respondents,

MASSACHUSETTS ASSOCIATION FOR RETARDED
CITIZENS, INC., a/k/a Arc/Massachusetts, Inc.,
Respondent,

DISABILITY LAW CENTER, INC.,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

**RESPONDENTS MASSACHUSETTS
ASSOCIATION FOR RETARDED CITIZENS
AND THE DISABILITY LAW CENTER'S
BRIEF IN OPPOSITION**

STATEMENT OF THE CASE

The First Circuit reversed a district court's injunction that interfered with the State's closing of one of its public institutions. The lower court's injunction

was based solely on its novel interpretation of a state regulatory process that had been incorporated into a consent decree which ended the court's oversight of a thirty-five-year-old class action. Where the consent decree was drafted by the parties and approved by the district court essentially verbatim, where the trial judge had not been actively involved in its implementation or enforcement for over a decade, where the trial court's decision was based entirely upon its finding of a violation of a state regulatory process incorporated into the decree, and where the district court did not purport to interpret any other provisions of the decree, plenary review was appropriate and consistent with the approach taken by this Court and all of the Circuit Courts of Appeals. Moreover, the First Circuit's decision was not dependent upon its use of the well-established *de novo* standard for reviewing a district court's interpretation of provisions of state law or of unambiguous provisions of a consent decree, since under any standard of review it would have reached the same conclusion. There simply is no conflict among the Circuits presented by this case, and, therefore, the Petition should be denied.

A. Litigation History

This litigation began in 1972 when a complaint was filed challenging the conditions in the Belchertown State School for individuals with mental retardation. Over the ensuing four years, similar suits were commenced against four other state schools,¹ including the Fernald Developmental Center, which is the

¹ The Commonwealth's former state schools are now referred to as intermediate care facilities for the mentally retarded or ICF/MRs.

subject of the proceedings below. These five cases were consolidated and consent decrees resolving the issues raised in these actions were entered in 1977 and 1978.² *Ricci v. Okin*, 537 F. Supp. 817, 819 n.1 (D. Mass. 1982) (recounting the history of the litigation). By 1986, "conditions had improved to the point where ... the court entered an order ... which, in the court's view, represented a 'step of disengagement.'" *Ricci v. Okin*, 978 F.2d 764 (1st Cir. 1992).

B. The Disengagement Order

By 1993, the process of disengagement that the district court initiated in 1986 culminated in the entry of a final Disengagement Order covering all five of the consolidated cases. The Disengagement Order "supplant[ed] and replace[d] each of the consent decrees and all orders of the court in these matters." *Ricci v. Okin*, 823 F. Supp. 984, 986 (D.Mass. 1993) (Order at Introduction and ¶ 1), P. App. 53.³ Contrary to the petitioners' repeated assertions, it was not the trial court "that wrote the consent judgment." Petition at 19, 20, 25, 33. Rather, as the record on appeal clearly documents, the Disengagement Order (hereafter DO) was "negotiated virtually word by word" by the parties and presented to the Court, which entered it without

² Contrary to the assertion in the Petition at 5, these consent decrees were not "crafted by Judge Tauro." Rather, as the district court explained, they were the result of "hundreds of hours of study, negotiation, and planning" by "the individuals concerned" and "embod(ied) the parties' collective assessment of the needs of the clients at the five state schools." *Ricci*, 537 F. Supp. at 820 (internal quotation marks omitted).

³ Citation to the opinions and orders contained in the Appendix to the Petition will be to the Appendix and page, in the form, "P. App. ___."

change. R. App. at 41a-53a (cover letter and copy of draft DO negotiated by the parties) (handwritten edits incorporated).⁴ The DO specifically provides that the five consolidated cases are “closed and removed from the court’s active docket [and] [a]ny action to enforce the rights of the plaintiff classes may be brought before the court only pursuant to the terms of paragraph 7.” DO at ¶ 1, P. App. 53.

Paragraphs 2, 4, 5, and 7 of the DO are relevant to the issues raised in this proceeding. Paragraph 2 requires the defendant Department of Mental Retardation (hereafter DMR) to provide appropriate services to the class members and to maintain individual service planning (ISP) regulations that are substantially equivalent to those in effect at the time of the DO, at least with respect to certain specific provisions. P. App. 54-56. Paragraph 4 specifies that DMR shall not approve a transfer of any class member from a state school to the community unless it certifies that the individual will receive “equal or better” services at the new location. P. App. 57-58. Paragraph 5 provides that nothing in the order is intended to limit DMR’s discretion to manage its budget and allocate its resources to ensure equitable treatment of all individuals with mental retardation. P. App. 58. Paragraph 7 is “the exclusive means of enforcing” the DO and provides that if the defendants “substantially fail to provide a state ISP process in compliance with this Order, or if there is a systemic

⁴ A comparison of the draft DO negotiated by the parties and the DO entered by the court (P. App. 53-63) clearly demonstrates that the district court simply entered the DO as written by the parties. The trial court did not craft or draft the DO. Citations to materials in the Appendix to this brief will be in the form, “R. App. __.”

failure to provide services to class members as described in this Order, the plaintiffs may seek enforcement of the Order.” P. App. 59-61. However, ¶ 7.b explicitly provides that state law – “including but not limited to the ISP regulations” – shall not be enforceable by the district court. P. App. 60.⁵

C. The Motion to Reopen

The district court docket indicates that for eleven years following entry of the DO, no pleadings were filed and no action taken by the district court in these closed cases. During that time, DMR closed one of the five state schools without any injunctive orders from the district court like the one at issue here, despite opposition by an organizational plaintiff parent association. Indeed, in the year prior to entry of the DO, DMR had closed another school, also without court action. In its 2004 budget, the Massachusetts legislature directed DMR:

[I]n order to comply with the provisions of the Olmstead decision and to enhance care within available resources ... [to] take steps to consolidate or close [the ~~still~~ remaining] intermediate care facilities for the mentally retarded ... and submit a preliminary plan for the closure of the Fernald Developmental Center....

2003 Mass. Acts, ch. 26, § 2, line item 5930-1000. Similar language was included in the 2005 and 2006 state budgets. P. App. 6. In response to the legislative instruction to plan for the closure of Fernald and other state schools, the parents of Fernald class members filed a motion in 2004 in the district court seeking to reopen the case, alleging that the defendants

⁵ A more detailed analysis of these provisions is found in the First Circuit decision. P. App. 10-13.

were systemically violating the DO. P. App. 13. That motion was denied without prejudice on January 20, 2005, after the defendants entered into a stipulation agreeing to bifurcate the ISP process for Fernald residents so that the initial ISP meeting would only concern the appropriate services and supports needed by the individual and a follow-up meeting would be held to separately discuss placement. P. App. 25-26.

Approximately one year later, on February 2, 2006, the Fernald parents filed a "status report" with the court, reasserting many of the same complaints raised in their earlier Motion to Reopen. On February 8, 2006, the district court appointed the United States Attorney for Massachusetts as court monitor "to advise the court as to whether the past and prospective transfer processes employed by the Department of Mental Retardation comply with federal law, state regulation, as well as the orders of this court...." P. App. 35. After a detailed, more than one-year-long investigation of the services and processes provided by DMR at its intermediate care facilities and in its community programs, the Monitor submitted his final report on March 6, 2007. P. App. 36.

D. The Monitor's Report and the District Court Injunction

The Monitor determined that the defendants had fully complied with state and federal law, and all provisions of the DO with respect to the operation of facilities, the community service system, and the provision of "equal or better" services to transferred class members, including the 49 residents of Fernald who had recently transferred to other residential settings. R. App. 19a-34a. There was no finding that the ISP process had been violated, or even a sug-

gestion that its purpose, function, and provisions were not fully respected.⁶ Indeed, the overwhelming majority of class members and their guardians reported "extremely positive attitudes regarding the moves."⁷ R. App. 32a-33a. Despite finding DMR in total compliance with federal and state law and with the DO, the Monitor speculated "that some of the residents at Fernald could suffer an adverse impact, either emotionally and/or physically, if they were forced to transfer from Fernald...." R. App. 39a.

In response to the Monitor's findings and conclusions, the parties filed briefs and documentary materials. The district court did not hold an eviden-

⁶ The statement of the Wrentham Association for Retarded Citizens, Inc. (Wrentham) that the Monitor and district court made "express findings that these individualized processes *were* conducted, systemically, in a way that prevented a truly personalized assessment of residents' needs" is simply incorrect. Wrentham Brief in Support of Petition at 15 (emphasis added) (hereafter "Wrentham brief"). The Monitor made no finding whatsoever concerning a violation of the ISP process or regulations. Rather, the Monitor found, and the district court agreed, that DMR had fully complied with all of its obligations under the DO. R. App. 19a-34a; P. App. 38.

⁷ Wrentham repeatedly and erroneously insists that DMR engaged in a pattern of coercion and intimidation in transferring Fernald residents to other facilities. See Wrentham brief at 10-12, 28. But neither the Monitor nor the district court made any findings or even a suggestion of intimidation or coercion. To the contrary, the district court found that "DMR had complied with the Final Order's requirement that transferred residents obtain 'equal or better services'" and "that the transfers that have taken place so far may have been in the best interests of residents...." P. App. 37-38, 39. The First Circuit correctly notes that Wrentham's claims of intimidation find no support in the Monitor's Report, the district court's opinion, or the record. P. App. 28, n. 9 ("...the record does not sustain the accusation").

tiary hearing, but instead relied entirely on the documentary record after hearing argument from counsel. The only document from the voluminous record to which the district court referred in its decision was the Monitor's Report. The district court adopted the Monitor's findings that all past transfers from Fernald met the "equal or better" requirement of the DO. P. App. 37-38. The district court also adopted the Monitor's speculative assumption about the harm that might occur to some residents if forced to relocate from Fernald and then found that, were defendants to close Fernald, this would constitute a systemic violation of DMR's regulatory ISP process. P. App. 38, 39-40. Relying upon pure conjecture regarding future events, based entirely upon its interpretation of the state ISP regulations and process, and contrary to its own finding that defendants were in full compliance with federal and state law, as well as the DO, the district court reopened the case and entered the August 14, 2007 order. P. App. 35-45; R. App. 1a-2a.

E. The First Circuit Decision

The First Circuit decision begins by noting the salient facts that led up to the district court's decision to reopen the case. Most notably, the Court pointed to three state budgetary acts from 2004 to 2007 that instructed DMR to close and/or consolidate its intermediate care facilities, including Fernald. P. App. 6. Related to these budgetary measures was the fact that the cost of care at Fernald averaged \$259,000 per person annually, while comparable care in a community setting costs the state only \$102,103 per year. P. App. 7. After detailing the history of the litigation, the relevant provisions of the DO, the proceedings related to the motion to reopen, the

Monitor's Report's findings and the district court's decision, P. App. 9-18, the First Circuit turned its attention to the specific issues on appeal.

The Court articulated the standard of review for construction of the consent decree in this action as *de novo*. P. App. 21. It then noted that ¶ 5 of the DO "plainly contemplated that DMR, in its discretion, would be able to close institutions," and that ¶7.b of the DO "does not permit state law, including the ISP regulations or review of the Superintendent's decision [regarding the provision of equal or better services] to become enforceable in the federal court." P. App. 21. The Court next focused on the findings of the Monitor's Report, the only document relied upon by the district court. Noting that the Monitor found that "[t]he defendants' practices under the Disengagement Order ... were consistent with the terms of the Order," as well as federal and state law, and "that DMR had complied with its obligations [between 2003 when the decision to close Fernald was announced and 2007]," the Court determined that there was no basis to conclude that the defendants had violated the terms of the DO. P. App. 22-23. With respect to the Monitor's and district court's speculation that the closing of Fernald would somehow compromise the integrity of the ISP process as set forth in state regulations, the First Circuit noted that the Monitor found, and the district court agreed, that all 49 residents transferred from Fernald subsequent to the announced closure had been treated in full conformity with the dictates of the DO, and that closures of other state schools had not resulted in any systemic failure of the defendants to meet their obligations under the DO. P. App. 24.

Because the district court's order was predicated upon its conclusion that the "systemic failure" consisted of "[a]dministering [the state regulatory ISP] process under the global declaration that Fernald will be closed," the Court undertook an analysis of the state ISP regulations. First, the Court noted that while the DO requires an ISP process, neither the DO nor the ISP regulations "predetermine the placement that which will result at the end of the ISP process." P. App. 24. Because the ISP process is focused on services a resident needs, not where those services are to be delivered, "the very nature of the ISP process contradicts the district court's conclusion." P. App. 24-25. Furthermore, if a resident disagrees with the outcome of the individualized ISP process, "the Disengagement Order commits these disputes to resolution in a state forum and under state law and thus provides no basis for federal court intervention." P. App. 27-28. For all these reasons and more, the First Circuit easily concluded that:

[t]his *individualized* process, that the Commonwealth has followed, cannot constitute a "systemic failure" to provide a compliant ISP process." The legal premise for the court's conclusion was in error.

P. App. 27 (emphases in original).

The First Circuit summarily disposed of the petitioners' remaining contentions that the district court's order could be sustained as a modification of the DO, an exercise of jurisdiction to rectify a putative new constitutional violation, or an exercise of ancillary jurisdiction.⁸ P. App. 28-33.

⁸ Because those determinations are not germane to this Petition, the Arc and DLC respondents will not describe them.

REASONS FOR DENYING THE WRIT

Since petitioners never asked the First Circuit to apply other than a *de novo* standard in its interpretation of the consent decree, they have waived the sole argument they now assert justifies this Court's review. They cannot claim that the appeals court erred in applying the very standard of review for which they argued in their briefing below.

Petitioners, for the first time in this case, now assert that the circuits have divided on the standard for reviewing a district court's interpretation of a consent decree. But the circuits are entirely uniform in applying a *de novo* standard in the context this case presents — interpretation of a state law provision incorporated in a consent decree. And no court of appeals has held that an abuse of discretion standard applies to a district court's interpretation of a consent decree generally. Accordingly, though courts have used slightly different language to describe their review of consent decree interpretation, there is no conflict in the holdings of the courts of appeals germane to this case.

Even if there were such a conflict, this would not be an appropriate case in which to address it, since the district court's interpretation of the consent decree here was so manifestly inconsistent with the decree's terms that it would have been overturned under any standard of review.

Respondents will also not address the discussion of *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999), contained in the amicus brief submitted by the Voice of the Retarded, Inc. (VOR). VOR amicus brief at 20-22. The questions presented do not raise any issue remotely related to *Olmstead*.

I. The Current Position of the Petitioners – That a Trial Court's Interpretation of the Provisions of a Consent Decree Should Be Reviewed for Abuse of Discretion – Was Not Raised Below and, Therefore, Is Waived on Appeal.

Fed. R. App. P. 28(a)(9)(B) and (b)(5) require that both the appellants and the appellees include in their respective briefs "for each issue, a concise statement of the applicable standard of review." The petitioners, in their First Circuit brief, articulated the standard of review as follows:

In reviewing a judgment decided by a judge sitting without a jury, this court must accept the District Court's findings of fact unless they are clearly erroneous. This deferential standard extends to inferences drawn from the underlying facts.

This court must review conclusions of law, including the judge's ultimate decision *de novo*.

Brief for Plaintiffs-Appellees Fernald Class Members at 19 (internal citations omitted).⁹ Because the proper interpretation of a consent decree is a conclusion of law, and because the interpretation of state law requirements incorporated into a consent decree is undeniably a conclusion of law, the petitioners cannot complain about the First Circuit's decision to accept the standard of review they proffered. Significantly, not one of the cases included in the Table of Authori-

⁹ The only other party to submit a brief to the First Circuit urging affirmance of the district court order was the Wrentham Association for Retarded Citizens, Inc. It is not a petitioner here. See, Wrentham brief at 4, n.1; Supreme Court Rules 12.6 and 14.2.

ties of this Petition (other than prior opinions in this case) was cited in the Fernald Class' brief to the Court of Appeals. Issues neither raised nor decided by the Court of Appeals are not ordinarily accepted for review on certiorari. *Glover v. United States*, 531 U.S. 198, 205 (2001); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001). Therefore, the Petition should be denied.

II. All Circuit Courts Apply a *De Novo* Standard in Reviewing a District Court's Interpretation of State Law or of State Law Requirements That Are Incorporated into a Consent Decree.

A. The Circuits Are Unanimous in Reviewing *De Novo* District Court Interpretations of State Law.

This Court has considered the standard of review pertaining to a district court's interpretation of state law and concluded that the appropriate standard is *de novo* review, without any deference to the trial court's analysis. *Salve Regina College v. Russell*, 499 U.S. 225, 231, 239 (1991). Following the decision in *Salve Regina*, every Circuit has explicitly recognized that it must review district court determinations of state law *de novo*, without according any deference to the lower court's decision. *Bohne v. Computer Associates Intern., Inc.*, 514 F.3d 141, 143 (1st Cir. 2008); *Colavito v. New York Organ Donor Network, Inc.*, 438 F.3d 214, 220 (2d Cir. 2006); *Aciero v. Cloutier*, 40 F.3d 597, 609-10 (3d Cir. 1994) (*en banc*); *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994); *Texas Clinical Labs, Inc. v. Leavitt*, 535 F.3d 397, 403 (5th Cir. 2008); *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 624 (6th Cir. 2008); *Aguirre v. Turner Const. Co.*, 501 F.3d 825, 828 (7th Cir. 2007);

Medical Liability Mut. Ins. Co. v. Alan Curtis LLC, 519 F.3d 466, 472 (8th Cir. 2008); *In re Estate of Covington*, 450 F.3d 917, 925 (9th Cir. 2006); *Anderson v. Commerce Const. Services, Inc.*, 531 F.3d 1190, 1193 (10th Cir. 2008); *Gilchrist Timber Co. v. ITT Raiponier, Inc.*, 472 F.3d 1329, 1331 (11th Cir. 2006); *F.D.I.C. v. Bender*, 127 F.3d 58, 64 (D.C. Cir. 1997); *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1051 (Fed. Cir. 2001).¹⁰ As this consistent and well-established line of authority makes clear, an appellate court can and must review a district court's interpretation of state law *de novo* without deference to the lower court.¹¹

This rule applies with equal force to the standard of review for interpretations of statutory require-

¹⁰ While most of these cases, not surprisingly, arose under federal court diversity jurisdiction, the decision in *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (*per curiam*) makes clear that the rule of *Salve Regina* applies with equal force to cases arising under the court's federal question jurisdiction.

¹¹ Amicus VOR accepts, as it must, that *de novo* is the appropriate standard for review of a district court's interpretation of "a statute, regulation, or precedent of a higher court," as well as "a simple contract" or the unambiguous provisions of a consent decree. VOR amicus brief at 12, 15, 18. That is precisely what occurred here. The determination of whether DMR provided a "compliant ISP process" necessarily involves a judicial analysis of the requirements of that state regulatory process. Since VOR acknowledges that the district court was interpreting the state's ISP regulations when it decided that the policy decision to close Fernald violated the letter or spirit of those rules, VOR amicus brief at 11, the lower court's familiarity with the issues or its supervisory role in the litigation is not relevant. Rather, both as a matter of law and judicial efficiency, see VOR amicus brief at 18, ascertaining the meaning and scope of state law is a task uniquely appropriate for an appellate court to undertake *de novo*. *Salve Regina*, 499 U.S. at 231, 239.

ments incorporated into a consent decree. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576-77 (1984) (reversing order purporting to enforce equal employment opportunity consent decree based on trial court's interpretation of Title VII). There simply is no split among the Circuits when reviewing a district court's application of state law or state law requirements that are included in a consent decree.

B. The Sole Basis for the District Court's Reopening the Case Was Its Unsupported Finding of a Violation of State Law.

The district court's order reopening the case and imposing additional obligations on the defendants was predicated solely on its determination that "administration of the ISP process" under the Commonwealth's stated policy that Fernald should be closed "amounts to a 'systemic violation' to provide a compliant ISP process within the meaning of the Final Order." P. App. 40. This conclusion rested entirely upon its reading and interpretation of state law requirements that were incorporated into the consent decree. P. App. 40-41.

Although Paragraph 7.a of the DO provides that plaintiffs could seek enforcement of the DO "[i]f the defendants substantially fail to provide a state ISP process in compliance with this Order," P. App. 59-60, the DO provisions concerning the ISP process simply obligated the defendants to maintain and comply with state regulations governing the ISP process.¹²

¹² The DO provides that DMR retains the discretion to modify its own regulations, as long as it discusses potential changes with the plaintiffs. It also specifies that any revised ISP process

Neither the district court nor the petitioners have asserted that the current ISP regulations contravene these requirements.¹³ Only by interpreting the ISP regulations to require that existing residents be given the opportunity to designate Fernald as their preferred residential placement could the district court possibly justify its decision and order of August 14, 2007.¹⁴ That the district court's decision is predicated upon its interpretation of the state ISP regulations is made clear by its discussion of "the essential function

be substantially equivalent to the ISP regulations then in effect with respect to the definition of the ISP, the individualized nature of the ISP, the existence of an appeal process, and certain principles regarding human dignity, self-determination, and the opportunity to live and receive services in the least restrictive and most normal setting possible. DO at ¶¶ 2.a, 2.b (cross referencing fns. 2 & 3), P. App. 54-56, 58-59. No allegation has ever been raised that DMR improperly amended its ISP regulations.

¹³ Because the defendant's ISP regulations complied in all respects with the requirements of the DO, the First Circuit properly concluded, under any standard of review, that the district court had no authority to reopen the case. P. App. 22-23 and 26-33.

¹⁴ The very notion upon which the district court acted – that residents or their guardians were somehow precluded from expressing their preference to remain at Fernald – is remarkable. Not only do the ISP regulations specifically provide for individual meetings with the resident and guardian where issues such as the individual's needs and preferences would be discussed, but the defendants entered into a Stipulation with the Fernald plaintiffs to bifurcate the ISP process so that discussions about appropriate placement would be held only after the resident's service needs had been determined. P. App. 25-26.

of the ISP process" and what the process is "intended to provide."¹⁵ P. App. 40.

C. The First Circuit Properly Applied a De Novo Standard in Reversing the District Court's Interpretation of State Law and a State Regulatory Process.

The First Circuit decision carefully analyzed all of the bases upon which the district court's order could be sustained. After finding that the facts found by the Monitor and adopted by the district court did not establish a violation, much less a systemic violation, of the DO, the First Circuit turned its attention to a careful analysis of the ISP regulations. P. App. 26-28. Based upon its *de novo* analysis of the ISP regulations, the First Circuit specifically rejected the district court's interpretation of DMR's regulations that "the removal of one of several residential facilities which have been found to comply fully with the Disengagement Order" could constitute a "violation of the ISP process." P. App. 24. The First Circuit explained that because of the individualized nature of ISP determinations, the petitioners' concerns that some Fernald residents might not receive the services and supports they need through that process does not establish a "systemic" violation. Rather, the regulations themselves provide the remedy for such an error by providing extensive administrative appeal and judicial review rights.

¹⁵ The DO specifically provided that individual disputes arising out of the ISP process are not encompassed within the district court's enforcement powers, but rather must be resolved through the state administrative appeal and judicial review process. DO at ¶ 7.b, P. App. 60; *see also* District Court decision, P. App. 44 ("Consistent with the Final Order, this court will not review the results of individual ISP processes").

P. App. 27-28. In undertaking this analysis of state law, the First Circuit properly accorded no deference to the district court. *Salve Regina*, 499 U.S. at 231, 239. However, because the First Circuit found the district court to be clearly wrong, deference would not have altered the outcome in any event. *Id.* at 237 ("Where the ... determinations of the two courts diverge, the choice between these standards [*de novo* or deference] is of no significance if the appellate court concludes that the district court was clearly wrong").

III. Every One of the Courts of Appeals Applies a *De Novo* Standard in Reviewing a District Court's Interpretation of an Unambiguous Provision of a Consent Decree.

A. Since Every Circuit Court Applies a *De Novo* Standard in Reviewing a District Court's Interpretation of the Unambiguous Provisions of a Consent Decree, There Is No Split in Authority.

This Court routinely has applied a *de novo* standard to reviewing interpretations of consent decrees, which are, after all, contracts between the parties that have been endorsed and approved as court orders. In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), the Court explained "that the 'scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it' or by what 'might have been written had the plaintiff established his factual claims and legal theories in litigation.'" *Id.* at 574 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)). Simi-

larly, in *Braxton v. United States*, 500 U.S. 344 (1991), this Court reviewed a lower court's interpretation of a stipulation of the parties. The Court first noted that review of the stipulation would be undertaken "just as we would review a determination of the meaning and effect of a contract, or consent decree...." It then explained that "[t]he question, therefore, is not whether there is any reasonable reading of the stipulation that supports the District Court's determination, but whether the District Court was right." *Id.* at 350. It would be hard to find a clearer statement of non-deferential *de novo* review.¹⁶

Careful analysis reveals that all of the Circuits identify *de novo* as the controlling standard of review. Some, mostly in *dicta*, consider the issue of deference only if there is substantial ambiguity as to the meaning of a consent decree provision. The Circuits which the petitioners assert utilize this "deferential *de novo*" standard are the Fourth,¹⁷ Sixth, Seventh,

¹⁶ In articulating the proper approach to interpretation of the stipulation in *Braxton*, the Court cited with approval two cases, *Washington Hosp. v. White*, 889 F.2d 1294, 1299 (3d Cir. 1989), and *Frost v. Davis*, 346 F.2d 82, 83 (5th Cir. 1965). Both cases set out a standard of plenary review of a lower court's interpretation of a contract, although the *Washington Hosp.* court also acknowledged that where a lower court has engaged in fact finding to discern the meaning of an ambiguous contract term, the reviewing court will review those findings of fact for "clear error."

¹⁷ While the petitioners list the Fourth Circuit in their heading to Section A.1 of the Petition, the only Fourth Circuit decision which they cite is *Thompson v. United States Dep't of Housing and Urban Development*, 404 F.3d 821 (4th Cir. 2005). However, *Thompson* did not involve the interpretation of the provisions of a consent decree, but rather whether the trial

Eighth, and Ninth Circuits.¹⁸ A review of the cases relied upon by the petitioners demonstrates that the purported split in authority is more ephemeral than real, and, in any event, would have no impact on the outcome in this case.

The Sixth Circuit case relied upon by the petitioners, *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 371-72 (6th Cir. 1998), articulated a standard that grants some deference to “the interpretation of a consent decree by the district court that *crafted* the consent judgment.” (emphasis added). That case is distinguishable on its face from this Petition, since, contrary to the erroneous assertion of the petitioners, the district court below did not craft the DO, thereby rendering the Sixth Circuit’s standard inapplicable to the current case. Moreover, the *Sault Ste. Marie* court found that the terms of the consent judgment at issue were unambiguous, thereby rendering any reliance on deference unnecessary.¹⁹ *Id.* at 373.

court was justified in modifying a consent decree based upon changed circumstances.

¹⁸ VOR incorrectly asserts that the Second Circuit also utilizes a deferential *de novo* standard, citing *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985). VOR amicus brief at 8-9. However, the *Berger* court applied a pure *de novo* standard of review, *id.* at 1568, as have later Second Circuit panels. See, e.g., *Tourangeau v. Uniroyal, Inc.*, 101 F.3d 300, 307 (2d Cir. 1996); *Barcia v. Sitkin*, 367 F.3d 87, 106 (2d Cir. 2004).

¹⁹ The other Sixth Circuit case mentioned in the Petition, *Huguley v. General Motors Corp.*, 52 F.3d 1364 (6th Cir. 1995) actually qualifies the notion that the trial court’s interpretation is accorded any meaningful deference. The *Huguley* court first notes the apparent inconsistency between according deference to the trial judge and reviewing the decree *de novo* and then explains that “the district court’s reading of the decree [is]

In neither of the two Seventh Circuit cases cited by the petitioners was deference in fact accorded to the trial court. In *Foufas v. Dru*, 319 F.3d 284, 286 (7th Cir. 2003), Judge Posner specifically noted that the deference standard “is not applicable here,”²⁰ and Judge Ripple explained that the statements regarding deference were “admittedly dicta.” *Id.* at 288. Similarly in *United States v. Alshabkhoun*, 277 F.3d 930, 935 (7th Cir. 2002), the Seventh Circuit found that the defendant had violated “the clear terms of the Consent Decree,” thereby rendering resort to a deference standard unnecessary.²¹

The Eighth Circuit case relied upon by the petitioners first reviews the district court’s consideration of extrinsic evidence regarding the intent of the parties for clear error, and then relies upon that finding regarding intent in its evaluation of “the decree as written.” *United States v. Knote*, 29 F.3d 1297, 1300 (8th Cir. 1994). It is well established that a court can consider extrinsic evidence regarding the intent of the parties to resolve an ambiguity in a contract and

merely an additional tool for contract interpretation.” *Id.* at 1369-70 (emphasis added). Ultimately, the Court affirmed in part, reversed in part and remanded the matter to the district court for further consideration. *Id.* at 1370-73. However, nowhere in the analysis of the issues does it signal that it is granting any deference to the district court.

²⁰ As Judge Posner explained, “the rationale for deferential review fails when as in this case the judge’s decision does not turn on his interpretation of the agreement that he approved.” *Id.* at 286-87.

²¹ Lending further strength to the fact that the deference standard articulated in *Alshabkhoun* was dicta is the fact that the “sole issue” on appeal did not even include the proper interpretation of the decree, but rather whether the enforcement of the decree violated public policy. *Id.* at 934.

that those findings are subject to review under the clearly erroneous standard of Fed. R. Civ. P. 52(a). Indeed, the petitioners acknowledge this general rule. Petition at 30-31. To the extent that the Eighth Circuit's deference rule is tied to the lower court's factual findings based upon extrinsic evidence, it is neither controversial, nor relevant to this case.²²

Like all the other Circuits, the Ninth Circuit begins with a *de novo* standard of review, although it occasionally goes on to afford some deference to the district court's interpretation of the term of its consent decree, if it has been involved in "extensive oversight of the decree from the commencement of the litigation to the current appeal." *Compare United States v. F.M.C. Corp.*, 531 F.3d 813, 818-19 (9th Cir. 2008) (including deference) *with Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1990) (no deference); *Botefur v. City of Eagle Point*, 7 F.3d 152, 156-57 (9th Cir. 1993) (no deference). The Ninth Circuit's condition for deference is not present here, since the district court was not involved with the DO for over a decade, had never been asked to resolve any dispute thereunder, and, instead, had removed the case from its docket for over eleven years prior to the Fernald parents filing their first motion to reopen. Even if

²² There were no facts in dispute in the current case. All parties and the trial court accepted the factual findings of the Monitor regarding the State's compliance with the federal law, state law, and the DO. The petitioners attempt to characterize the Monitor's speculation regarding future noncompliance if Fernald were closed as a finding of fact that was adopted by the trial court. This is inaccurate. As the First Circuit properly explained, it is simply not possible to infer from a history of full compliance with all aspects of the decree that the State would, sometime in the indefinite future, violate it and then do so in a systemic fashion. P. App. at 23-24, 27.

the condition were applicable, the First Circuit's conclusion would not be affected, for like the Ninth Circuit in *F.M.C.*, it rejected the district court's interpretation, finding that the provision at issue "clearly expresses the parties' intent...." *F.M.C.*, 531 F.3d at 821. In doing so, the Ninth Circuit aligns itself with all the other Circuits which recognize that *de novo* always is the standard of review and that deference does not apply to unambiguous provisions of a consent decree.²³

The current case involved the enforcement of a consent decree crafted by the parties, not the trial court, and whose provisions were unambiguous and not interpreted by the lower court.²⁴ Under such circumstances, all Circuits apply an unadulterated *de novo* standard of review. There is no split of authority in the Circuits over the appropriate standard of review at issue in this case.

²³ The other two Ninth Circuit cases relied upon by petitioners also fail to further their cause. In *Nehmer v. Veterans' Administration*, 284 F.3d 1158 (9th Cir. 2002), the Court found that the plain language of the decree dictated the outcome. *Id.* at 1161-62. The court in *Nehmer* also noted that in class action litigation, it is particularly important to look to the plain language of the decree, "because a member of the class who was not present at any negotiations would be at a disadvantage in presenting extrinsic evidence...." *Id.* at 861 (quoting *Molski v. Gleisch*, 318 F. 3d 937, 946 (9th Cir. 2003)). Similarly, in *Officers for Justice v. Civil Service Comm'n of San Francisco*, 934 F.2d 1092, 1094 (9th Cir. 1991), the Circuit Court found that the district court's interpretation "is supported by the language of the decree."

²⁴ Even the party supporting the Petition conceded that the provisions of the DO at issue in this case were unambiguous. Wrentham brief at 9 ("Importantly, the district court's decision was not based on a construction of disputed terms in the Disengagement Order").

B. That Some Courts, Mostly in Dicta, May Articulate a “Deferential de Novo” Standard of Review Does Not Constitute a Split of Authority Meriting Supreme Court Review.

The cases relied on by the petitioners also fail to show that the outcome of any one of them was impacted by deference accorded to the lower court’s interpretation of the consent decree. Indeed, in many, if not most of the cases, the occasional references to “deference” constituted nothing more than *dicta*. In others, the reference appears to signal nothing more than deference to the trial court’s findings of fact regarding the intent of the parties when discerning the meaning of ambiguous decree provisions, which is already required by Fed. R.Civ. P. 52(a). Finally, in the remaining few cases, the concept of deference reflects nothing more than the common sense notion, articulated by this Court, that appellate courts should give “careful consideration of the district court’s analysis” and “will naturally consider this analysis in undertaking its review.” *Salve Regina*, 499 U.S. at 232-33.²⁵ To the extent that the

²⁵ This common sense approach to the treatment of lower court interpretations of consent decrees is utilized by the First Circuit in appropriate cases. See *F.A.C. v. Cooperativa de Seguros de Vida de Puerto Rico*, 449 F.3d 185, 192, 194 (1st Cir. 2006) (noting that it is “common sense” to accord some deference to the careful analysis of the district court regarding an ambiguous consent decree provision where the judge participated in the negotiations and his decision “is reasonable and more likely right than wrong”). That the First Circuit was aware of this approach is evident from the fact that it cited *F.A.C.* in support of the *de novo* standard of review. P. App. 21. That the First Circuit did not accord any deference to the district court decision here is due, not to abandonment of its

district court's decision is based on any particular "expertise" and demonstrates "analytical sophistication," it will, of course, be more persuasive to the reviewing court. *Id.* Appellate respect for the well reasoned analysis of the trial court is not at all inconsistent with *de novo* review. *Id.* at 233.

Thus, the Circuits all begin with, and adhere to, a *de novo* standard of review in analyzing a district court's interpretation of a consent decree, particularly where the provision at issue is unambiguous, as it was here. When provisions are ambiguous and the parties' intent is at issue, some Circuits engage in the "appropriately respectful application of *de novo* review" endorsed by this Court in *Salve Regina*. *Id.* While the Circuits may describe this exercise somewhat differently, there is no meaningful difference in actual application. In any event, this is not an issue of sufficient importance to warrant plenary review and, certainly, this is not an appropriate case to present this issue.

C. No Circuit Has Held That Review of Provisions of a Consent Decree Should Be Only for Abuse of Discretion, As Argued by the Petitioners.

The petitioners assert that the appropriate standard of review of a district court's interpretation of a consent decree should be "abuse of discretion." Petition at 3. No Circuit has adopted this standard of review of a consent decree, and for good reason. Such a decision would constitute a total abdication of the Circuit Court's "obligation of responsible appellate review." *Salve Regina*, 499 U.S. at 239. Further-

"common sense" approach, but because the facts and circumstances of this particular case did not call for deference.

more, it would conflict with this Court's rulings in *Firefighters v. Stotts*, 467 U.S. at 574, *United States v. Armour & Co.*, 402 U.S. at 681-82, and *Braxton v. United States*, 500 U.S. at 350, that reviewing courts discern the meaning of a contract or consent decree "within its four corners."

The only case that the petitioners cite that articulates an "abuse of discretion" standard is *Thompson v. U.S. Dep't. of H.U.D.*, 404 F.3d at 827. However, *Thompson* did not involve review of the district court's interpretation of a consent decree, but rather the lower court's determination of whether the requisite showing had been made to modify the decree due to changed circumstances. *Id.* Because the district court in the present case did not purport to justify its order based upon any modification of the decree, but rather on the defendants' putative violation of it, the standard articulated in *Thompson* is simply irrelevant to the question presented. Certainly, where the petitioners are seeking through their Petition for Certiorari to establish a standard of review that not one Circuit has adopted and that is at odds with Supreme Court precedent, the Petition does not present an issue warranting certiorari review.

IV. Since the Sole Basis for the District Court's Injunction Was the State's Policy Decision to Close Fernald, and Since the Consent Decree Explicitly Guaranteed that the State Had Discretion to Allocate its Resources and to Close its Public Institutions, the First Circuit Properly Concluded That the District Court Lacked Jurisdiction to Reopen a Thirty-Five-Year-Old Case and Had Improperly Found a Violation of the State's ISP Process.

A. The Sole Basis for the District Court's Order Was the Closing of Fernald, Which Was Explicitly Envisioned and Authorized By the Consent Decree.

The sole basis for the district court's order was its conclusion that "the Commonwealth's stated global policy judgment that Fernald should be closed, has damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis." P. App. 39. This conclusion was drawn from the Monitor's Report which, without any clinical or other expert evidentiary support and, instead, relying primarily on stereotypes, unfounded fears and sympathy, opines "that some of the residents at Fernald could suffer an adverse impact, either emotionally and/or physically, if they were forced to transfer from Fernald to another ICF/M or to a community residence." R. App. 39a. The Monitor then recommends that "Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an 'equal or better' service outcome." R. App. 39a-40a. The district court

specifically adopted these speculative concerns and then translated them into a violation of the state regulatory ISP process.²⁶ P. App. 38.

The district court's guess about what may happen in the future, particularly where it is contrary to all evidence about what has happened in the past, is clearly not an adequate foundation upon which to reopen a fifteen-year-old disengagement order, restrict the State's discretion to close a public institution,²⁷ and enter an order modifying a mutually agreed-upon consent order over the objection of both the state defendants and other plaintiffs. *See, U.S. v. Michigan*, 940 F.2d 143, 163 n.12 (6th Cir. 1991) (court cannot modify decree based upon conjecture); *see also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 200-01 (2003); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-106 (1983).

²⁶ To the extent that the district court's order might be interpreted as predicated on a speculative conclusion that placements from Fernald would result in its residents being denied "equal or better services" at their new location, such a contention is belied by the record. As the district court found, "[a]fter a year of exhaustive and meticulous study, the Court Monitor concluded that the DMR had complied with the Final Order's requirement that transferred residents obtain 'equal or better services'." P. App. 37-38. Nevertheless, the district court inappropriately presumed, without the benefit of any supporting evidence, that in the future, State officials will not continue to place and provide services for Fernald residents in good faith, but rather will deny them the "equal or better" services to which they are entitled at any new location to which they may be transferred. P. App. 38-40. The First Circuit correctly noted that this presumption had no basis in the record. P. App. 22-27.

²⁷ The Commonwealth previously had closed two of the facilities without judicial interference and consistent with extant court orders.

The district court's order is in direct contravention of the specific provision of the DO which provides that "nothing in this Order is intended to detract from or limit the *discretion* of the defendants in ... managing and determining ... the budget of the Department of Mental Retardation ... or allocating its resources to ensure equitable treatment of its citizens." P. App. 58 (emphasis added). This proviso reserved to DMR the discretion to determine whether it would close any of its large public institutions. This provision was negotiated during a period when DMR had just closed one facility and was planning for the closure of another, P. App. 22, 24, and the district court judge specifically noted on numerous occasions that "[t]he court is not opposed to the eventual closing of Dever [State School] or any other Consent Decree facility." *Ricci v. Okin*, 781 F. Supp. 826, 827-28 (D. Mass. 1992); P. App. 22, n. 8. Indeed, in the decision accompanying the 2007 order reopening the case, the district court acknowledged that the consent decree "does not prohibit the closure of any facility." P. App. 43, n. 17.

The First Circuit recognized that the DO expressly permitted the closure of DMR's facilities, and took as a given that the State had the discretion to decide which facilities it would operate. See, e.g., *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785 (1980) (the federal Medicaid law that subsidizes nursing homes and ICF/MRs furnishes no "right to continued residence in the home of one's choice"). It held that the ISP process does not guarantee an individual the placement of their choice or the right to remain in a particular facility or program. P. App. 24. It noted that the appeal sections, 115 Code Mass. Regs. §§ 6.30-6.34, 6.63, are available if the individual disagrees with a proposed modification or

transfer. P. App. 27-28. As a result, it correctly concluded that the district court lacked jurisdiction to reopen a thirty-five-year-old lawsuit, since the lower court improperly interpreted state law and wrongly concluded that the State's decision to close Fernald undermined the state ISP process that was required by the DO. P. App. 22-28.

B. Although the First Court Acknowledged the District Court's Longstanding Oversight of the State's Mental Retardation Facilities, It Properly Applied a De Novo Standard in Concluding That the District Court Did Not Have Jurisdiction to Reopen the Case, Since There Was No Evidence of a Violation of Either Federal Law or Any Provision of the Consent Decree.

The First Circuit was well aware of the district court's longstanding involvement with this case. It specifically noted that the court "has conscientiously and with great care presided over institutional reform litigation concerning these mentally retarded persons since 1972." P. App. 3. It also acknowledged that "[t]he district court actively oversaw the implementation of the consent decrees for almost ten years" prior to the DO.²⁸ P. App. 10. Finally, the Court "recognize[d] the able stewardship exercised by

²⁸ This is a reference to the district court's oversight of the individual decrees in the five separate cases. The district court's active oversight ended with the entry of the DO in 1993, which closed the cases and removed them from the court's active docket. DO at ¶ 1, P. App. 53. The cases remained dormant until 2004, when the proceedings that culminated in the district court's 2007 order and ensuing appeal began.

the district court over the years, which led to the improvement of conditions for the Fernald residents and to the landmark 1993 consent decree.” P. App. 34. However, the Court also recognized that the district court’s active involvement with the case ended in 1993 with the entry of the DO.

Despite these acknowledgments of the district court’s long involvement with the case and its obvious recognition of its precedents which accord some deference in appropriate circumstances to a trial court’s interpretation of a consent decree that it has been actively administering, P. App. 21 (citing *F.A.C., Inc.*, 449 F.3d at 192 for the standard of review), the First Circuit properly accorded no deference to the district court in this case. First, the district court’s determination of a consent decree violation was grounded entirely on its erroneous interpretation of state regulations and their incorporation into the consent decree. *Salve Regina*, 499 U.S. at 231, 239. Second, there was no interpretation of an ambiguous provision of the DO – as opposed to state law – by the district court to which the First Circuit could accord deference. Finally, the district court’s order directly contravened the provision of the DO that granted to the defendants discretion over decisions to operate or close facilities, and was based upon the illogical inference that the defendants, who had been found to have totally complied with the DO in all respects, would, nevertheless, fail to do so in the future absent court intervention.²⁹ Any one of these reasons would have justified reversal under any standard of review.

²⁹ Wrentham incorrectly claims that the First Circuit improperly reviewed the district court’s 2007 order “*de novo*.” Wrentham brief at 27-29. In fact, the First Circuit did not review or interpret *any* aspect of the 2007 order. Rather, it

**C. Certiorari Review Is Not Appropriate
Because Resolution of the Issue Raised
Will Not Alter the Outcome Below.**

As the First Circuit's decision makes clear, this was not a close case. The district court's order was neither factually nor legally sound. A more deferential standard of review would not have changed the result.³⁰ As this Court has observed, "the mandate of independent review will alter the appellate outcome only in those few cases where the appellate court would resolve an unsettled issue ... differently from the district court's resolution, but cannot conclude that the district court's determination constitutes clear error." *Salve Regina*, 499 U.S. at 237-38. This is not one of those "few cases." The First Circuit easily found that the district court order was erroneous. The result would not be different under a "deferential *de novo*" approach. Because resolution of the issue raised in the Petition will not alter the outcome of this case, review on certiorari is not appropriate. The Petition should be denied.

determined that the district court did not have the authority to reopen the case or to enter any order at all. P. App. 20, 28.

³⁰ Amicus VOR asserts that application of a more deferential standard of review might produce a different result, but utterly fails to explain how that might occur. VOR amicus brief at 10. In fact, the opposite is true. Under any standard, the district court's speculation that DMR would in the future systemically violate its ISP regulations during the process of closing Fernald is untenable. Where the evidence established and the court found that DMR had fully complied with state law, federal law and the DO with respect to the transfer of Fernald residents, it defies logic and law to conclude that DMR would not continue to do so in the future. It is not surprising that the First Circuit had little difficulty determining that the decision to reopen the DO was error.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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March 4, 2009

1a

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Filed 08/14/2007]

Civil Action Nos. 72-0469-T
74-2738-T
75-3910-T
75-5023-T
75-5210-T

ROBERT SIMPSON RICCI, *et al.*,
Plaintiffs,

v.

ROBERT L. OKIN, *et al.*,
Defendants.

August 14, 2007

ORDER

TAURO, J.

As set forth in the accompanying Memorandum, the court hereby orders:

1. Defendant DMR's Motion to Dissolve Court's Injunction of February 8, 2006, Barring Transfers from the Fernald Developmental Center [# 214] is ALLOWED.
2. Any further communication from Defendant Commonwealth of Massachusetts Department of Mental Retardation to Fernald residents and their guardians which solicits choices for further residential placement shall include

2a

Fernald among the options which residents and guardians may rank when expressing their preferences.

IT IS SO ORDERED.

/s/ JOSEPH L. TAURO
United States District Judge

APPENDIX B

[Logo]

U.S. Department of Justice

Michael J. Sullivan

United States Attorney

District of Massachusetts

United States District Court

John Joseph Moakley U.S. Courthouse

1 Courthouse Way - Suite 9200

Boston, MA 02210

March 6, 2007

The Honorable Judge Joseph L. Tauro

United States District Court

John Joseph Moakley U.S. Courthouse

1 Courthouse Way - Suite 2300

Boston, MA 02210

Re: The Monitor's Report on Whether the "Past and Prospective transfer processes employed by the Department of Mental Retardation were in compliance with Federal Law, State Regulations, as well as Orders of the Court."

Dear Judge Tauro:

I am writing you in my capacity as Court appointed Monitor in the Fernald matter. Since the appointment in February, 2006, our office has conducted extensive visits to all of the Commonwealth's Intermediate Care Facilities for the Mentally Retarded (ICF/MR) within Massachusetts, including four visits to Fernald, and visits to Hogan, Monson, Templeton, Wrentham and Glavin. We have met with well over 250 guardians, parents and siblings at Fernald and other ICF/MRs, and have visited with and met with most of the residents of these facilities during their

day programs and in their residences. In addition, we visited over 30 community residences and numerous day centers. We have also reviewed all of the pleadings in the *Ricci v. Okin, et. al.* filings, and ascertained that there are approximately 3,959 Ricci class members. Overall, 49 individuals were transferred from Fernald since February 26, 2003 with 35 transferring to ICF/MRs and 14 transferring to community residences.

While our review touched on a number of issues raised by plaintiffs and guardians, two areas of significant concern were delivery of medical services and the potential for greater abuse and neglect in the community.

To best understand how medical services are provided for individuals residing in community residences, and how investigations of alleged neglect and abuse are conducted, our office received two presentations from the Department of Mental Retardation (DMR) on Medical Services to Ricci Class Members in the community, and how Allegations of Abuse and Neglect are Investigated by DMR. Our office invited all of the plaintiffs' counsel to attend the presentations, and thereafter, solicited written comments and questions from plaintiffs' counsel. Upon receipt of the plaintiffs' comments and questions, our office asked DMR to respond in writing. These presentations, and the follow-up questions and answers, gave our office tremendous insight into how medical services are accessed by mentally retarded individuals in community residences. The presentation on how Allegations of Abuse and Neglect Are Investigated was extremely informative. We also independently reviewed the Disabled Persons Protection Commissions Vendor Survey Reports for all ICF/MRs and for community

residences since January, 1996. We met on a number of occasions with counsel for the parties and conducted bi-weekly conference calls. We requested and were provided assistance from counsel and the parties to better appreciate the issues, challenges and successes as it related to the services provided to our most vulnerable citizens. Overall, the review by the Monitor attempted to meet the scope of review defined by the Court. Our approach was to achieve a full understanding of the various arguments and allegations being raised by the plaintiffs, in order to provide the Court with a more comprehensive report.

1. Overview of the Intermediate Care Facilities for the Mentally Retarded (ICF/MRs)

- A. The Hogan Regional Center

Our office visited the Hogan Regional Center at 450 Maple Street, Hathorne, Massachusetts. Our office was extremely impressed with the facility and the level of comprehensive medical care that is provided to each individual. The facility has an extremely functional design and is situated on 54 acres. The facility was opened in 1967 and is presently home to approximately 151 individuals and has a capacity for 166 individuals. The physical layout consists of several discrete residential units and vocational work sites with a central gymnasium, pool, cafeteria, auditorium and motor training area. The facility is Title XIX qualified and is capable of providing service coordination dependent upon an individuals assessed needs. These needs could include the following: Assistive Technology, Audiology, Dental, Medicine, Neurology, Nursing, Nutrition, Occupational Therapy, Orthotics, Orthopedics, Peripatology, Physical Therapy, Psychology, Social Services, Speech Therapy, Therapeutic Recreation and Voca-

tional Services. The Day Program at the Hogan Regional Center is directed by North Shore Enterprises. The program is conducted in two buildings and over half of the individuals at Hogan attend the program. The remaining individuals at Hogan attend day programs in the community between 9:00 a.m. and 3:00 p.m. The day programs range from very basic skill building to pre-vocational skills.

The Hogan Regional Center is well maintained and exhibited bright cheerful artwork throughout the facility. We noted that the staff takes great pleasure in making each living area as comfortable and well decorated as possible. This feeling of home was a recurrent theme throughout all of the ICF/MRs that we visited.

B. The Wrentham Development Center

Our office visited the Wrentham Development Center at 131 Emerald Street, Wrentham, Massachusetts. We were extremely impressed with the facility and the level of comprehensive medical care that is provided to each individual. The facility services approximately 325 adults with mental retardation and has a capacity for 343 individuals. It opened in 1907 and is situated on 400 acres of open and wooded land. The configuration of the facility includes 5 large buildings and 13 houses. The facility also has a state-of-the-art 12 bed acute care medical center.

The medical center is also used for diagnostic evaluations, reassessment of chronic illness, and/or close medical or nursing observation. Overall, the facility offers a full range of clinical services in the area of medicine, nursing, psychology, recreation, social

work, occupational and physical therapy, communication, adult education and vocational services.

The Wrentham Development Center also houses the Quinn Program Center for workshops and day activities. Such activities include vocational, recreational and other learning and interactive programs. The complex has an Olympic size indoor pool with one-third of the pool having a floor that is adjustable from depths of zero to four feet of water. The building also has a full size gymnasium with all the modern exercise equipment and is overseen by adaptive physical education instructors.

The Wrentham residences are very nicely decorated and it is obvious that the staff takes great pride in making each residence very warm and inviting.

C. The Monson Development Center

Our office visited the Monson Development Center at 175 State Avenue, Palmer, Massachusetts. The facility was originally opened in 1898 as a hospital for people with epilepsy. Until 1970, epilepsy was the common and primary diagnosis for everyone admitted to the facility. Epilepsy and its treatment often result in the development of many other health conditions, and consequently, Monson has developed sophisticated medical services and supports to address the complex medical needs of its residents. The facility is situated on 588 acres and is located one mile from the Massachusetts Turnpike. Monson is a Title XIX consent degree facility that currently supports 186 people with a capacity for 385 people.

The age range for residents at Monson is between 35 to 87. The functioning ranges for the residents are between profoundly mentally retarded to mild, with 79% of the population functioning in the severe to

profound range. The facility has around the clock nursing including 4 nurse practitioners and 2 physicians on duty between Monday through Friday. There is an on call physician coverage for nights and weekends. Other clinical services provided include Occupational Therapy, Physical Therapy, Adapted Equipment, Psychology, Speech Therapy, Habilitation Coordination, Recreation, Nursing, Respiratory Therapy, Neurology, Podiatry, Optometry, Psychiatry and Gynecology. Monson uses The University of Massachusetts Medical Center and The Wing Memorial Hospital for acute care hospitalizations. Monson also has an on-campus hospital, which often shortens stays in acute hospitals, and provides extensive health services for people experiencing acute problems. Monson has an array of day programs including competitive employment, employment workshops, retirement services and sensory motor programs.

Although Monson was opened in 1898, the facility has undergone continuous renovation since 1975. Some of the improvements included upgrading electrical and water systems, renovating 15 living areas and permitting decorations and furnishings to reflect the personal preferences of the residents and their families. There is a strong sense of pride within the facility and it is evident in the longevity of the work force as the average years of employment at the facility is 20 years, and the average age of the employees is 45 years (we noted similar employment trends at the other ICF/MRs).

D. The Glavin Regional Center

The Glavin Regional Center in Shrewsbury was opened in May, 1974 and is situated 123 acres on Lake Street, Shrewsbury, Massachusetts. Each of the

approximate 63 resident receives residential and day programs. Glavin has a capacity of 63 residents. The programs are certified yearly by the Department of Public Health under Federal Title XIX Regulations. Although Glavin Regional Center did not come under the consent decree, approximately 18 residents who presently reside at the center are class members. The age for people living at Glavin ranges from 31 to 83. Glavin has the capacity to provide a variety of professional services including nursing, physical therapy, occupational therapy, psychology, psychiatry, speech and language pathology, vocational and recreation therapy.

Glavin is located high atop a hill with magnificent surrounding views. The facility is bright, cheerful, well decorated and located just off of Route 9 in Shrewsbury.

E. Templeton Development Center

The Templeton Development Center is located 70 miles west of Boston on 2,600 acres in Baldwinville, Massachusetts. Templeton is a Title XIX certified, state operated intermediate care facility that supports 143 adults with mental retardation with a capacity to support 160 individuals. Templeton, a Consent Decree facility, was originally developed as an extension of the Walter E. Fernald State School in May 1900. In 1992 Templeton became an independent facility known as Templeton Development Center. Templeton provides services for individuals ranging in age from 26 to 91. Templeton's residences are comprised of six lodges and three small 8-person homes. Templeton is an agricultural community that has the capacity to provide medical and clinical services to individuals with physical and emotional issues associated with the aging process. Templeton's

medical services are provided by Shriver Clinical Group, Henry Heywood Memorial Hospital and The University of Massachusetts Medical Center. Templeton utilizes twenty-four hour nursing coverage, two physician's assistants and a community based medical practice for on-site medical care. Dental service is provide on-site through a contract with Tufts Dental.

Templeton has developed highly specialized supports to assist and treat individuals with challenging behavioral issues. All individual supports are provided through the ISP team process. An ISP team composed of a QMRP, Nurse, Physician's Assistant, Social Worker, Psychologist, Recreational Therapist, Adult Educator, Vocational Rehabilitation Counselor, Occupational Therapist, Physical Therapist and Speech Pathologist. The facility provides on-site educational and vocational supports through four day programs and six vocational programs. Two of the on-site vocational programs provide training in the areas of dairy operation and farming. The facility also operates a productive dairy/beef program and a gardening program.

F. The Fernald Center

The Fernald Developmental Center is distinguished as the Western Hemisphere's oldest publicly-funded facility serving individuals who have developmental disabilities. Fernald is located on 186 acres in Waltham. Fernald's services concentrate on encouraging each resident to learn and grow by participating in a variety of programs designed to develop social, work and daily living skills. Between 1924 and 1970, Fernald became a site for expanded research into the causes of mental retardation, resulting in the opening of Shriver Center on the Fernald grounds in

1970. In 1974, Fernald entered into the Medicaid (Title XIX) program and into a consent decree process. Since that time, dramatic improvements have taken place in the quality of the residents' lives, and in the quality of services they receive. In 1993, Fernald merged with the, Metro Boston Region with a focus on opportunities in the community for individuals. In 1998 the Walter E. Fernald State School campus became known as The Fernald Center to reflect both the Fernald Developmental Center and the Marquardt Skilled Nursing Facility.

The individuals who live at Fernald have a range of developmental disabilities and most function at the profound level of retardation. As of September, 2006, there are 189 residents at Fernald and 29 resident at Marquardt with the age range of 35 - 94. The individuals who live at Fernald live in homes with groupings of 5 to 16. Thirteen buildings, including the Marquardt Nursing Home are currently used for residential housing. Six sites are used for vocational training and recreational pursuits. Fernald's residents receive services on and off grounds, ranging from leisure-based retirement programs to supportive employment. All Fernald residents receive some form of social security assistance and are covered by Medicaid. The Fernald Center employs more than 774 staff in administrative, direct care, clinical and support services positions. About 85 percent of the staff are engaged in direct care services. Fernald provides supports and services 24 hours a day. A team of direct service staff and clinicians work together to meet the individual needs of the individuals who live at Fernald. The teams may include speech, occupational, physical and recreation therapists, direct care staff, adult education, psychology, nursing, medical and nutrition staff. By being in compliance with

Title XIX Acts of 1974, Fernald receives Federal reimbursements. Some of the resources at the Fernald Center include an indoor handicapped accessible pool, gymnasiums, Activity Center and a ballfield.

2. Residential Placement Options Within Community

A. Residential placement options within the community are divided into essentially three options including supervised living, shared living and family partnership.

- (i) Supervised Living - If a family chooses supervised living they have a preference between a provider operated program or a state operated program. Typically, individuals can live in a home with anywhere from 1 to 5 other individuals. Each home has a house manager and direct support staff. Dependent upon the needs of the people living in the homes, there may be a nurse working in the home or available to the home. Staffing varies depending on the support needs of the individuals, but typically there are 2 direct support staff for 4 individuals. These homes have their own vehicles for transportation.
- (ii) Shared Living - Individuals have the option of living with a care provider in the care provider's home. The care provider can be single or have a family, and the provider is paid to support the individual. Oversight of such a living situation is provided by a residential support pro-

vider agency that provides placement, guidance and oversight.

- (iii) **Family Partnership** - A family partnership is an individual or family-directed cooperative arrangement in which a DMR consumer or his or her family provides or contributes toward the cost of a residence in which the Department provides or arranges for services to be provided. The arrangement provides individuals and families with greater choice and control over where a family member lives and will receive services such as in their childhood home or a particular area where an individual grew up or has community connections.

B. Community Day Supports

- (i) **Community-Based Day Supports** - These supports are provided to individuals who qualify for DMR services during the workday hours in lieu of employment supports. These services offer individuals an opportunity to develop, enhance and maintain their competence and confidence in personal, social and community activities. Individuals who are medically fragile or have other significant health, mental health or behavioral issues that limit their ability to be engaged in productive work activities.
- (ii) **DMA Day Habilitation** - A structured, goal-oriented active treatment program of medically oriented, therapeutic, and habilitation services that are intended to

raise individuals' level of functioning and facilitate independent living and self-management in their home communities.

- (iii) **Employment Supports** - Employment supports are for individuals of all abilities. Supports assist individuals to prepare for and experience gainful employment, and may include sheltered employment, work crews, enclaves, provider-owned businesses, volunteer work, provider-paid employment, and supported employment, with the overarching goal of quality jobs for individuals.
- (iv) **Competitive Employment** - This is full or part time paid work, which is done either in the public or private sector. Such work is **not** supported in any way by DMR. Individuals who work competitively are on company payroll and may be eligible for all employee benefits.
- (v) **DMA Adult Day Health** - A program to provide an alternative to 24-hour long term institutional settings through an organized program of health care, supervision, restorative services, and socialization. The Division of Mental Assistance administers this program.
- (vi) **DMH Day Program** - This Psychiatric Day Treatment Program is a planned combination of diagnostic, treatment, and rehabilitative services provided to mentally or emotionally disturbed indi-

viduals who need more active or inclusive treatment that is typically available through a weekly visit to a mental health center or hospital outpatient department, but who do not need full-time hospitalization or institutionalization. Such a program utilizes multiple, intensive, and focused activities in a supportive environment to enable individuals to acquire more realistic and appropriate behavior patterns, attitudes, and skills for eventual independent functioning in the community. Such programs may be operated by a freestanding clinic, a satellite facility of a clinic, a hospital licensed health center, or an identifiable unit of a clinic, hospital, or hospital licensed health center.

- (vii) MCB Day Programs - This Day/Work program is funded and operated by the Massachusetts Commission for the Blind (MCB).
 - (viii) MRC Employment and Training - These are Massachusetts Rehabilitation Commission (MRC) funded employment supports that include extended employment (EEP) at a private rehabilitation facility. This program offers supported employment in an integrated work setting, or transitional employment work experiences at a business or industry for the purpose of providing evaluation, training, and supervision.
3. Review of Medical and Clinical Services at the ICF/MRs and within the Community

In an attempt to independently glean a full understanding of the medical and clinical requirements of individuals seeking to transfer from Fernald to other ICF/MRs or to community residences, our office hired independent medical doctors with a history of caring for individuals afflicted with mental retardation. We asked counsel for the plaintiffs and the defendants to provide a list of qualified medical professionals that had experience in treating and servicing individuals with mental retardation. Once the list was finalized, it was distributed to counsel for the plaintiffs and the defendants. A period of time was allowed for our office to receive comments, suggestions and concerns regarding the list of medical professionals. Three medical doctors with extensive experience servicing individuals with mental retardation were chosen by our office. Our office had extensive discussions with these doctors, and specifically discussed the ISP process and DMR's use of the ISP process for both present and future needs of individuals who have transferred from Fernald, and for potential prospective transfers.

A. Medical Professionals Hired to Assist the Monitor

Lawrence W. Osborn, M.D., MPH, is the Associate Medical Director for Geriatric Psychiatry at Providence Hospital and Mercy Medical Center. He was a Commissioned Medical Officer for the United States Public Health Service between 1968 - 1988. He was the National Medical Director for Mental Health, U.S. Healthcare (then Aetna-U.S. Healthcare) between 1992-2001.

Dr. Robert Balder is a Board-certified family Physician and has a practice at the University of Massachusetts Medical School in Worcester. His current

practice includes caring for individuals with intellectual disabilities, and he makes house calls to group homes where 4-8 individuals with mental retardation reside. He also worked at Belchertown Development Center when it was operational.

Paul Millard Hardy, M.D. is a physician licensed to practice medicine in the Commonwealth of Massachusetts since 1977. Dr. Hardy is board certified in Neurology by the American Board of Psychiatry and Neurology and received sub-specialty training in Neuropsychiatry at Boston University School of Medicine. In 1976 he was the Joseph P. Kennedy Jr. Fellow in Medical Ethics at Harvard University. The following year he joined the Eunice Kennedy Shriver Center and worked as physician and neurological consultant at the Paul A. Dever State School in Taunton, Massachusetts. During that time he assisted in the evaluation of residents for transition into the community under the jurisdiction of this Court. He was medical director at the Fernald State School from 1982 to 1985 and held academic appointments in the departments of neurology at Harvard Medical School and the Tufts University School of Medicine. At Tufts he also held an appointment in the Department of Psychiatry. In 1980 he began an outpatient clinic at Tufts New England Medical Center in neurology for community-based developmentally disabled persons and in 1992 formed his own practice in neuropsychiatry in Hingham, Massachusetts where he has cared for many developmentally disabled individuals in the community.

B. Document Review Conducted by the Medical Professionals

The medical doctors reviewed various documents and reports for each of the transferred individuals to

assist our office in our investigation. Some of the documents reviewed included, but were not limited to, the following:

1. Results of Recertification Survey for Title XIX ICF/MR of Walter E. Fernald Developmental Center;
2. Results of Recertification Survey for Title XIX ICF/MR of Wretham Developmental Center;
3. Results of Recertification Survey for Title XIX ICF/MR of the Hogan Regional Center;
4. Results of Recertification Survey for Title XIX ICF/MR of the Monson Development Center;
5. Results of Recertification Survey for Title XIX ICF/MR of the Glavin Regional Center;
6. Results of Recertification Survey for Title XIX ICF/MR of the Templeton Development Center;
7. Medication and Routine Physician Orders;
8. Fernald Center - Title XIX Annual Medical Review per individual;
9. Annual Physical Examinations;
10. Psychiatric Clinic Notes;
11. Mental Health Care Team Reports;
12. Orthopedic Clinic Notes, Cardiology Services Reports, Radiologic examination reports and audiologic evaluation reports;
13. Tufts Dental Facility Reports;

14. Health Transfer Plans for each individual -- Covering Primary Care, Audiology, Dental, Orthopedics, Ophthalmology and Psychiatry. These reports identify client-specific resources at the new location available to meet an individual's assessed needs, both current and future;
15. Individual Transition Plan for each individual (the ITP covers Personal Characteristics, Special Information for Personal Routines, Social Life, Relationships and Communication, Physical Considerations and Equipment Needs, Safety Considerations, Health/Medical/Psychological Needs, ISP Reviews Transition and Fire Safety Forms, and OT/PT Team Reviews);
16. Individual Support Plan Meeting Reports;
17. Letters and Information Packets on each individual from The Fernald Center to Family Members/Guardians and/or Representatives;
18. Internal letters and information packets regarding individuals moving from one ICF/MR to another ICF/MR, and from an ICF/MR into a community residence; and
19. Characterization of Retardation Level and Psychological Assessment for each individual.

4. The Monitor's Findings

Our office was asked by the Court to conduct an investigation into whether the "past and prospective transfer processes employed by the Department of Mental Retardation were in compliance with Federal

law, State regulations, as well as Orders of the Court.”

A. DMR's Certification of Equal or Better Services

The plaintiffs have alleged that DMR is in violation of the Final Order of the Court entered on May 25, 1993, because the Facility Director of Fernald is not certifying that individuals to be transferred will receive equal or better services at their new residences. The plaintiffs are also alleging that the Facility Director is not certifying that ISP recommended services for the individual's current needs are available at the new location (see: Pleading #83, p. 4 of 21).

DMR has responded by stating that “the completed Individual Service Plan, in conjunction with the ISP Process represents the certification by the Facility Director (Linda Montminy) that the Individual's needs are being met in the new location” (Letter from Marianne Meacham to Beryl Cohen dated September 26, 2005; and Pleading #86, p. 13, Section C; Diane Enochs Aff. ¶ 10),

The 1993 Final Order of the Court provides as follows:

“Defendants shall not approve a transfer of any class member out of state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent community region) certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that all ISP-recommended services for the individuals

current needs as identified in the ISP are available at the new location.”

Ricci v. Okin, M.D. et. al., 823 F.Supp. 984, 987 (D. Mass. 1993).

Our office noted that the Court did not specify how the certification must be made, but it is clear that certification must be made. The Final Order is also silent on whether certification is required when transferring from one ICF/MR to another ICF/MR. Given these parameters, our office conducted an investigation into how the Facility Director certified that services currently being received would be duplicated and perhaps better at the new residence.

Our office independently verified that DMR, through its Facility Director, has certified for the 49 individuals transferred previously, that services will be equal or better. This certification was made through the Facility Director's review of objectives of an individual's current ISP as compared to their new ISP at the new location. Following January, 2005 DMR implemented a return to an explicit certification of equal or better services in the Ricci Change of Address Form for any transfers of class members. Our office also had the medical doctors that we retained review the ISPs of the individuals that transferred from Fernald to determine if the services received after the transfer met their needs.

Of note is DMR's position that transfers from an ICF/MR to another ICF/MR do not require a certification of equal or better because such certification is not required by the Final Order. Although the Final Order is silent on this specific scenario, our office found that all of the ICF/MRs were Title XIX certified. Each facility currently has the minimum ser-

vices, staffing and amenities to provide equal or better services. As expected, each ICF/MR has its own individual character and differing degrees of specialized services. The staff at all the ICF/MRs are extremely experienced and long tenured.

Through our tours of various community homes we witnessed services consistent with the Court's Final Order including the following: "residential programs; day programs; recreational and leisure time activities; medical, psychological, dental and health-related professional services; respite care and crisis intervention services; support and generic services, such as guardianship and adaptive equipment services; and transportation services." *Ricci*, 823 F.Supp. at 987. The medical doctors that we retained also confirmed that these services are available in the community, and reviewed the housing, health, employment and occupational needs of the clients. Individuals transferred to the community can receive these services equal or better than at the ICF/MRs.

While the services that are listed in the Final Order are available in the community, the issue is evaluating how these services are accessed and delivered, what the wait time is for these services and where the services are located as compared with where the individual resides and how that may impact on an individual basis "equal or better." Our office received a presentation from DMR regarding Medical Services to Ricci Class Members in the Community. This presentation shed light on how an individual in a community residence actually sees a physician and receives dental care. In the community residences the direct care staff makes the arrangements and appointments for a specific resident. Ultimately, this process takes much longer than the

process at Fernald and is more difficult to coordinate (*i.e.* our office noted that community residences have one wheelchair adaptive vehicle assigned per house. If this vehicle has to be used for pick-up and drop-off of other residents from day programs, coordination must be made with other vehicles operated by the provider). Based on the information provided one could not conclude that quicker access to medical care in and of itself equated to better care (the bedside manner of the community doctor located 20 minutes away could be better than the facility doctor that is on call, or just the opposite could be the case). But, given the physical limitations, and fragile emotional state of members of this population, coupled with a reduced mental capacity to communicate and explain an increase or decrease in the intensity of an ailment, we certainly understand the potential risks and why some guardians would prefer to have their ward in an ICF/MR and have a facility doctor on call.

An individual living in a community residence attends day programs outside of the residence. Some day programs offer a myriad of services during the day program including speech therapy, physical therapy and occupational therapy. Our office did note that some therapy, such as aquatic therapy in a heated room with a heated pool, are more difficult to access in the community. Aquatic therapy can be duplicated in the community but with effort.

Lastly, DMR organized tours of community residences throughout Massachusetts for our office. Counsel for the plaintiffs were invited to attend these tours. Our office also toured specific community homes at the request of counsel for the plaintiffs. Our tours revealed well maintained homes in very nice neighborhoods. The staffing patterns varied depen-

dent upon the needs of the residents. Our office did note that the tenure of most House Managers within community residences was less than 3 years, with 5 years being a rarity. Staff turnover was in some instances 100% every year and a half. Repeatedly, our office heard, from guardians and providers, that an on-going struggle is to maintain the continuity of staffing for better on-going care. The direct cause for the high turnover rate was the challenging work coupled with the low pay scale.

Guardians were present on some of the tours to discuss their experience of having their ward/family member in a community home. Some of the comments we heard included the joy of having their ward in his/her own home; having his/her own room to decorate with personal belongings without having something disappear; being closer to family and friends and taking advantage of community events; being able to cook in the kitchen, interact with the same roommates and being part of a community around the home. The recreational activities varied from home to home but essentially involved community activities such as summer concerts, picnics, shopping at the mall, going to restaurants, arts and crafts, holiday and birthday parties at the home and walking through the neighborhood. While one goal of the community residences is to integrate adults with disabilities within the community, a bedroom in a neighborhood home does not guarantee integration into the fabric of a neighborhood or a community. It takes an effort and commitment on the part of the provider to maximize these opportunities. From the perspective of DMR, as well as the guardians and the residents, community placement for many individuals has been a great success.

Given that medical and rehabilitative services, outlined by the Court's Final Order, can be met within the community, albeit through the more labor intensive methods used by direct care staff, our office found that DMR was in compliance for the transferred residents with certifying equal or better services in the community. It is important to note the vulnerability of many of these residents. Though those already in community homes appear to have adapted well, many seem younger than the average age of those still residing at ICF/MRs.

Unfortunately, after reviewing data from the Disabled Persons Protection Commission, our office did note some very concerning neglect and abuse trends in Contract Vendor operated community residences, as compared to the ICF/MRs and State operated community residences. These neglect and abuse trends, particularly sexual abuse, were of great concern to our office and shows that residents in our community homes are at a greater risk of being abused and/or neglected.¹

¹ The Disabled Persons Protection Commission provided our office with Vender Survey Reports for all ICF/MRs dating back to January, 1996. We also reviewed Vender Survey Reports for State operated community residences and Contract Vendor operated community residences dating back to 2002. Our office noted that over the years there was a steady increase in allegations of sexual abuse and physical abuse in Vendor operated community residences. The highest levels of sexual abuse occurred with the transportation providers for the Vendor operated community residences. Physical abuse was much higher in Vender operated community residences than in the ICF/MRs. Our office also noted that unreported incidents of abuse may even be higher in community residences due to the non-verbal nature of the clients. Lastly, there was very little to no sexual abuse noted for all of the ICF/MRs.

- B. The Green United States Postal Service Registered Mail Cards (Sent with the "Notice of Request for Proposed Facility Transfer" letter Returned to DMR with the Guardian's Signature).

Our office independently reviewed each file of the individuals transferred and found that DMR was in compliance with documenting the properly signed returned receipt of each Registered Mail Card from guardians.

- C. Notice of and Request for Proposed Facility Transfer ("45-Day Letter")

- (i) Documentation that 45-Day Letter was sent to Guardians

Our office independently reviewed each file of the individuals transferred and found evidence that the 45-Day Letter was sent to "individual's family, guardian, and designated representative" pursuant to 115 CMR 6.63.

- (ii) Receipt of the 45-Day Letter

Our office independently reviewed each file of the individuals transferred and found that DMR was in compliance with documenting the receipt of Notice of and Request for Proposed Facility Transfer Letter pursuant to 115 CMR 6.63(2) of the Department of Mental Retardation Transfer Regulations. The letters are complete with all the information required by the Regulation, and clearly provided guidelines for the appellate process (115 CMR 6.63(4)) before the Division of Administrative Law Appeals if the ward's ISP could not be fully implemented as a result of her guardian's objection to the proposed transfer.

Our office also noted that pursuant to 115 CMR 6.63(2)(c) and 115 CMR 6.63(2)(d) 2 and 3, that each guardian, through their consent to the proposed facility transfer, waived the 45-day waiting period.

Our office did not find any evidence that the 45-Day Letter was delivered to other parties, as described in 115 CMR 6.63(2)(a). Our office could not determine who, other than the legal guardian, would be entitled to receive this Letter. A copy of this Letter is maintained in the individual's permanent file at Fernald.

(iii) The Right to Visit and Examine the Proposed Homes

Our office found that although the specific language providing a right to visit was not always present in the 45-Day Letter for proposed moves, most of the guardians indicated that they had visited the new proposed residences. Our office would suggest that DMR insert the right to visit language in every 45-Day Letter whether or not a guardian has visited the proposed ICF/MR or proposed community residence. The specific language in 115 CMR 6.63(2)(c)(3) is as follows: "include a statement that the parties may visit and examine the proposed home at a time and in a manner not disruptive to individuals who may be living in the home."

(iv) Language within the 45-Day Letter Inviting Guardians to Consult with Service Coordinators and Other Staff Regarding the Advantages and Disadvantages of the Transfer

Our office independently reviewed the files of all the individuals that transferred and found language in each 45-Day Letter identifying the telephone num-

ber for the DMR Service Coordinator/QMRP, and other individuals working for DMR available to discuss with the Guardian the new ICF/MR or community residence. DMR is in compliance with 115 CMR 6.63(2)(c)(4).

(v) Allegations of DMR Violating 42 CFR 483.12 (Code of Federal Regulations)

Our office did not find any violations by DMR of 42 CFR 483.12. Specifically, these regulations pertain to the admission, discharge and transfer standards for skilled nursing facilities and nursing facilities in general, and do not address the transfer of residents from ICF/MRs.

(vi) DMR's Consultation with the Guardians of the 49 Transferees

Our office has verified that DMR received the consent of all of the guardians for the transfer of all 49 individuals from Fernald. Some of these Guardians, representatives and family members were located out of state, and thus there was a varying level of involvement of each individual.

(vii) The Right to Return Letter

Our office found that for individuals being transferred from Fernald to another ICF/MR, DMR did not provide the Guardians with a Right to Return Letter. DMR's position was that these individuals were not transferring from an ICF/MR to the community and thus it was not necessary to provide the Guardian with a Right to Return Letter.

Our office identified six individuals transferred from Fernald following the Court's June 15, 2005 hearing making it clear that anyone who leaves can return if they choose. Following this hearing, ap-

proximately six individuals were transferred from Fernald to the community and each individual's file contained a Right to Return Letter. Prior to this hearing date, such a letter was not routinely provided to Guardians of individuals that transferred from Fernald to the community.

(ix) Informed Consent Regulations

The plaintiffs allege that DMR failed to comply with State regulatory requirements to obtain knowing consent, voluntarily given by an individual's guardian, of the advantages and disadvantages of the proposed move. Specifically, the plaintiffs contend that DMR has failed to comply with 115 CMR5.08(1)-(3) by utilizing a blanket consent form that states as follows:

"I (guardian) have received timely notice of the proposed transfer pertaining to (individual) from (place) to (place) on or about (date) pursuant to 115 CMR 6.63(2) of the regulations of the Department of Mental Retardation. I have also received notice of my rights under these regulations. I understand my right to deny consent to the proposed transfer and my right to a hearing. After considering the information I have received about the proposed transfer, I am satisfied that this transfer is in (individual's) best interest. All my questions have been answered to my full satisfaction. I, therefore, choose not to object and hereby consent to the proposed transfer."

(Pleading #83, p. 9).

DMR responded by stating that plaintiffs are relying on regulatory provisions for "informed consent" that pertain to admission to a [nursing] facility or prior to medical or other treatment that requires the

risks and benefits of admission or medical treatment. DMR's position was as follows:

"The Fernald Plaintiffs erroneously contend that the voluntary transfer of an individual from a Department facility requires the "informed consent" of the individual or guardian. "Informed consent" is a term of art defined in the Department's regulations, and is required only in limited instances and is generally reserved for medical procedures, research activities, facility admissions or related activities. See 115 CMR § 5.08. Transfer from one setting to another requires consent, not "informed consent" as defined in 115 CMR § 5.08; nevertheless, the 45-day letter and consent form the Department provides during the transfer process clearly meets this standard as well as the standard set forth in 115 CMR § 2.01's definition of "consent."

(Pleading #86, p. 25 fn. 13).

Our office found that pursuant to 115 CMR 5.08, informed consent of an individual, or a guardian, is required (a) prior to admission to a facility; (b) prior to medical treatment; (c) prior to involvement of an individual in research activities; (d) prior to level II or III behavior modification interventions; and (e) prior to the release of personal information. In addition, the person securing consent shall: (1) explain the intended outcome and nature of procedure involved in the proposed treatment; (2) explain the risks, side effects of treatment or activity; (3) explain the alternatives to the proposed treatment; (4) explain that consent may be withheld or withdrawn; (5) present the information in a foregoing manner understood by the individual; and (6) offer to answer additional questions.

Informed consent is a term associated with medical procedures, not requests to transfer. The doctrine of informed consent imposes on a physician the duty to explain the procedure to the patient and to warn him of any inherent risks or dangers, it is specific to the medical procedure and is not intended to be used synonymous to the requirement of consent. *See Kissinger v. Lofgren*, 836 F.2d 678, 680 (1st Cir. 1988) (explaining doctrine of informed consent in Massachusetts requires a plaintiff to establish (1) the existence of a duty owed by the defendant to inform about significant risks, consequences, and options of a medical treatment, and (2) that breach of this duty caused harm to plaintiff). Requiring "Informed Consent" is specific to medical procedures and treatments. *See Rosaria v. U.S.*, 824 F. Supp. 268, 286 (Mass. 1993) (explaining the doctrine of informed consent derives from the notion that a person has a strong interest in being free from non-consensual invasion of his bodily integrity; person needs to make an intelligent decision whether to proceed with a specific course of treatment); *Goldstein v. Kelleher*, 728 F.2d 32, 39 (1st Cir. 1984) (finding that informed consent rest on foresight, not hindsight, where patient would not have undergone medical procedure had she known the risks); *Harrison v. U.S.*, 284 F.3d 293, (1st Cir. 2002) (finding that a physician must disclose any material information to enable patient to make an informed judgment whether to give or withhold consent to a medical or surgical procedure).

DMR's Notice of and Request for Consent to proposed Facility Transfer letter in fact complies with the consent requirement for transfers involving non-medical circumstances. 115 CMR § 5.08 requires informed consent for medical procedures and other potential invasion tactics or procedures such as Level II

or III modification interventions (restraining an individual) or involving a person in research activities. This is not similar to a guardian providing consent to have his/her ward transferred to another ICF/MR or a community residence.

Lastly, the plaintiffs rely on 42 CFR 483.12 as stating that DMR failed to comply with this Regulation prior to transferring 49 individuals. 42 CFR 483.12 governs specialized services for mental illness or mental retardation for persons found to require care within a skilled nursing facility. We did not find that this Regulation applied to ICF/MRs. *see also Rolland v. Romney*, 318 F.3d 42 (1st Cir. 2003) (holding the Commonwealth is responsible for providing specialized services that result in active treatment when combined with services provided by nursing facilities); *Rolland v. Cellucci*, 138 F.Supp.2d 110 (D. Mass. 2001) (The State was required to provide specialized services to the mentally retarded regardless of whether they resided in private nursing homes or state-owned facilities).

Our office did not find that DMR initiated any transfers without the full knowledge and consent of guardians. There were no allegations from any of the guardians, or from our medical doctors, that there were any unmet active treatment needs for the individuals transferred.

D. Post Placement Satisfaction Surveys from Guardians of the Transferees

All of the individuals that responded to the Post Placement Satisfaction Surveys affirmatively stated they participated in planning for their ward's placement. The surveys were measured by numerical

rankings with #1 being the most favorable and #5 being the least. The ratings were as follows:

- (I) 78% rating #1
- (ii) 14% rating #2
- (iii) 2% rating #3
- (iv) 1% rating #4
- (v) 1% rating #5
- (vi) 4% not rating at all but writing commentary.

The written commentary reflected extremely positive attitudes' regarding the moves. A recurrent theme found was hesitancy to move from Fernald due to familiarity. Many of the guardians stated that they decided to transfer their ward from Fernald based on the announcement that Fernald will be closing. The comments were positive regarding the moves for a variety of reasons. There were recurrent themes of reduced care at Fernald due to staffing issues and low morale. The other ICF/MRs were praised for their wonderful staff, an improvement in services and environment. There was praise for the Fernald staff, particularly when it came to assisting in the transition, but the general sense was the lack of certainty in the closing of Fernald was causing problems.²

With regard to Guardians that preferred a transfer from Fernald to the community, the responses were also positive. Many Guardians reported an opportunity to visit their children, wards and siblings more frequently and at any time of the day. The responses to the surveys did not give the impression that there was any concerns or tendencies to seek a return to Fernald.

² It should be noted that 6 individuals of the 49 individuals who transferred from Fernald died within 2 years of the transfers.

E. The Home and Community Based Services Waiver Program

The plaintiff's contend that DMR failed to fully explain the "Home and Community Based Services" Waiver Program to the guardians so that the guardians could make an informed consent to proposed community placement. Informed consent was discussed above in section ix, and our office found no Federal Law, State Regulations and any Orders of this Court requiring DMR to have a specific discussions with guardians on the Home and Community Based Services Waiver Program.⁵

5. The Monitor's Final Assessment

DMR's directive to close Fernald has come with an offer by DMR for any resident seeking to remain at an ICF/MR, having the option of transferring to another ICF/MR. All of the ICF/MRs are Title XIX certified and DMR claims that they all have the capacity to potentially meet the need to provide equal or better treatment, care, professional services and medical treatment to all of the Fernald residents. With the appropriate involvement of family members and/or guardians, each resident at Fernald could be transferred to another ICF/MR to achieve the objective of closing Fernald, but clearly at a cost to individual residents. In this respect, DMR can duplicate the basic services and medical treatment for any resident at any of its ICF/MRs. Unfortunately, this solution does not solve the underlying problem.

The true issue plaguing the plaintiffs as a whole runs much deeper than simply transferring all of Fernald's residents to another ICF/MR. For many residents, Fernald is their home, the average age is 57 years, the average length of stay is 47 years, the

oldest resident is 95 and has been there for 81 years. The question is simply after all these years at this facility will their lives be equal or better if transferred elsewhere? As the guardians are getting older, they express both a fear and a mistrust. The guardians have expressed a fear of who will care for their loved ones, and a mistrust of whether promises made today will be broken in the future. The plaintiffs also claim that given the high level of sexual and physical abuse in the community, lack of accessibility to medical and dental services, along with high staff turnover and potentially less qualified staff, residential community homes are not the answer for many residents. Another concern is that although individuals in community residences supposedly have access to community activities, residing in the community does not guarantee that an individual will be integrated into the community. The plaintiffs fear that following Fernald's closing, Wrentham, Monson, Hogan, Glavin and Templeton will soon follow. The plaintiffs hold a genuine fear of years and years of shuffling sons, daughters and wards in an attempt to stay ahead of the next closure before being forced into community residences.

This very fragile segment of the Massachusetts' population strives for simplicity and constants to thrive and conduct their daily lives, and the threat of change does have an impact on the physical and emotional health of some of the residents. Similar to our old shoes that fit just right, or that favorite reclining chair that has molded perfectly to a body over the years, or the room and building we have spent our life calling home and those around us we consider family and friends, we all seek familiarity to ground our lives. We cherish these items for the indescribable comfort that they provide. For the severely men-

tally retarded, such a loss of familiar surroundings and most importantly people, could have devastating effects that unravel years of positive, non-abusive behavior. Moreover, the joy that each of us experiences from seeing the same person who serves morning coffee at the coffee shop, or that neighborhood person who greets you every morning for the past umpteen years, is also experienced ten fold by, in many cases, this segment of the population that has been cared for by the same State workers for ten, twenty and even thirty years in the ICF/MRs. Change for most of us comes at a cost, for the most vulnerable, the slightest change can have dramatic and permanent consequences.

Our office has been touched by the families willing to share their stories with us over the past year. The story of one mother and father who showed love and support for their son/daughter, and concerned that the closure of Fernald would mean a mad rush for the choice locations, decided to move their child. Their child had been cared for brilliantly at Fernald for over 40 years. Within one year, they received a call that their child was found on the floor and had died. Today, they ask themselves, in an attempt to do the right thing, had they failed their child by moving him/her after so many years of him/her flourishing at Fernald? The same fears grip others and for two Sundays and over twelve hours our office listened to such concerns by no less than 200 caring parents, sisters, brothers, aunts, uncles, guardians, nieces, nephews and friends. Our office has been inundated with pleas to keep Fernald open since now, through the Court's intervention, Fernald is a much different place and has reached respectable levels of care.

On one particular Sunday our office spent six hours listening to stories portraying Fernald during those dark years when the conditions were atrocious. Now, they proclaimed, Fernald is a place where people can thrive and truly call home. Faces are familiar and people have brought laughter to the halls and the programs. On another Sunday we were invited to morning Service by Father William Leonard. We were moved by the outpouring of young volunteers from the community that wheeled residents from the Green building across the street to the Chapel for Sunday Service. Those same volunteers either stayed or returned in time to escort the residents back to the Green building upon completion of Services. The community had embraced the residents at Fernald and the residents enjoyed their Sunday morning Service. Overall, we all work hard every day to provide comfort, stability and security for our families. We cannot imagine after residing in a home for thirty, forty or fifty years, and finally getting it to the point where you feel comfortable, stable and secure, that you are now told to pack up and move with potentially more moves to endure. Any of us would be outraged.

Today there are far fewer citizens in our ICF/MRS than a decade ago. For those that have moved into the community homes and are thriving this has been a good and important outcome. The Commonwealth in its attempt to address excess capacity is moving towards consolidation. There are other options that can address excess capacity and achieve some savings without resorting to closure of this facility.

In an attempt to find a solution for the Fernald residents, our office was surprised to find such vast acreage surrounding the various ICF/MRs. Glavin

has 123 acres, Monson has 588 acres, Templeton has 2,600 acres, Wrentham has 400 acres and Fernald has 186 acres. At Fernald, it may be possible to group the homes and work sites of Fernald residents by dividing the buildings north of Pine Street and west of Cherry Lane and condense the campus. The Commonwealth could then sell the remainder of the land for residential development. DMR could also build some new residential homes on the land and have support services for these residents at Fernald.

Servicing individuals with mental retardation in ICF/MRs and the community each offers advantages and disadvantages to both systems. The model across the United States appears to be shifting toward housing the mentally retarded in community residences. Despite this trend, the strength that Massachusetts holds is allowing families to have a choice for their family members and wards. As this segment of the population ages, their parents and relatives are also aging. Many of the residents at Fernald have family members that live within close proximity to Fernald. We have met numerous individuals through our visits to Fernald that have expressed how difficult it would be for them to drive the distance to another ICF/MR to make that daily or weekly commute to visit their loved ones. Our office was amazed at the many residents at Fernald that have lived there for thirty, forty and fifty plus years. Many of the State workers can boast twenty or thirty years tenure at Fernald. These employees have become more than individuals waiting to achieve the benefits of State retirement, they are family to the residents who rely on them every day for the most basic needs that we take for granted. Breaking these decade long bonds is not the solution these residents deserve, nor should they be forced to experience

countless moves given the conditions they had to endure before the Court's intervention.

Since the Monitor's Appointment in February, 2006, our office has witnessed outstanding medical and social care in all of the ICF/MRs. The quality of life for the ICF/MR residents is excellent, and this Court's persistence and insistence, over the past three decades, in raising the level of care for the mentally retarded is certainly remarkable. The Herculean effort shouldered by this Court since the early 1970s has, without doubt, enriched the lives of our mentally retarded citizens. This Court's effort is reminiscent of another monumental undertaking by the late Honorable Judge A. David Mazzone to revitalize Boston's Harbor as a waterway capable of nurturing and sustaining life. In many ways, this Court has accomplished the same task, as guardians of individuals residing within the ICF/MRs have provided our office with a clear understanding that the residents within these facilities receive the support that nurtures and enhances their quality of life.

As a result of a year long investigation, our office has concluded that some of the residents at Fernald could suffer an adverse impact, either emotionally and/or physically, if they were forced to transfer from Fernald to another ICF/MR or to a community residence. Our office would recommend the implementation of a development plan that would enable Fernald to remain open and provide services to some of the Commonwealth's most vulnerable citizens.

In summary, based on our review of all the conditions that are considered for "equal or better" services, it is the opinion of the Monitor that residents should continue to have the opportunity and option to

move from Fernald to other ICF/MRs, or to a community residence, provided that the Certification Process is enforced. Additionally, and most importantly, considering the uniqueness of each of the ICF/MRs, and the vulnerability of the residents, Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an "equal or better" service outcome.

We are available at your convenience to provide any further information regarding this report. Thank you for the opportunity to assist the Court.

Sincerely,

/s/ Michael J. Sullivan

MICHAEL J. SULLIVAN

United States Attorney

/s/ Rayford A. Farquhar

RAYFORD A. FARQUHAR

Deputy Chief

Civil Division

41a

APPENDIX C

HILL
&
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Telephone [Illegible] Facsimile [Illegible]

April 20, 1993

By Hand

Honorable Joseph L Tauro
United States District Court
District of Massachusetts
U.S Post Office & Court House
Boston, MA 02109

Re *MARC, et al. v. Weld, et al.*
Civil Action Nos. 72-469-T, *et al.*
Agenda for April 26, 1993 Conference

Dear Judge Tauro

In response to your order of April 8, 1993, I enclose a proposed final order. The basic proposed order has been agreed to between the defendants and the Dever and Wrentham plaintiffs. This document is the result of a number meetings and negotiations in which both sides have given up some things they thought were important and accomplished some things they thought were important. It is, therefore, a totally integrated document, negotiated virtually word by word.

Inserted into this document, in bold face type, are additions and proposed changes of the remaining

plaintiffs. Because these proposed changes were provided to me today for insertion into the document, neither the Dever and Wrentham plaintiffs nor the defendants have had an opportunity to review or consider the proposed language.

The parties understand that we will also discuss at the April 26 meeting the Executive Order to be issued by the Governor to establish a Commission on Mental Retardation. The defendants and the Dever and Wrentham plaintiffs request that certain language in the draft sent to us under cover of your order dated March 29, 1993 be changed.

On page 9, the parties request that the last sentence of paragraph 4.1(b) read as follows:

If the matter has not been resolved pursuant to the procedures described in (i) - (iv) above, or the Administrator's conciliation effort has not resolved the matter, then the administrator may refer the complaint to the Commission for its review.

The parties want to make sure that the already established procedures for resolving complaints have a chance to resolve those complaints prior to action by the Commission.

Secondly, the first sentence in paragraph 4.2 should indicate a footnote after the phrase "unless otherwise prohibited by law". That footnote should read:

The Department of Mental Retardation has determined that disclosure to the Commission of otherwise confidential information about its consumers shall be in the consumers' best interest and therefore shall not be prohibited by law.

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Throughout the Executive Order reference should be made to the Advisory *Panel*, which is its proper name, not the Advisory Board.

Lastly; the parties have not agreed on a budget for the Commission. The parties believe this should be part of the agenda at the April 26 hearing and we will be prepared to discuss that with you.

Sincerely yours,

/s/ Nonnie S. Burnes
Nonnie S. Burnes

BURN/pw/OH5
enc

c: Tom Wachtell (By Hand)
David Ferleger, Esq. (By Fax/U.S. Mail)
Douglas H. Wilkins, Esq. (By Hand)
Kim E. Murdock, Esq. (By Hand)
Beryl W. Cohen, Esq. (By Hand)

44a
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Telephone [Illegible] Facsimile [Illegible]

April 28, 1993

By Hand

Chris Brown
United States District Court
District of Massachusetts
1615 U.S. Post Office & Courthouse
Boston, MA 02109

Re: *Marc v. Weld*: Revised Order

Dear Chris:

I enclose a diskette (in Word Perfect) so you may put the proposed final order on your system. After the diskette was made, Kim Murdock called with two typographical changes, one formatting problem and one point of clarification. So all attorneys will see those adjustment, I am enclosing a copy of the order as they saw it previously, with my handwritten notes I would appreciate it if you would make those changes on the final order once the document is on your system, I understand that you will be making the revisions to the Executive Order that will be incorporated with this order.

The defendants and I will be talking about a budget for the Commission. I understand that Kim Murdock will be in touch with Chickie about sche-

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duling time for a public signing by the Judge and the Governor.

Please call me if you have any questions.

Sincerely yours,

/s/ Nonnie S. Burnes
Nonnie S. Burnes

BURN/pw/OJ5

encs

cc: Douglass H. Wilkins Esq. (By Mail)
David Ferleger, Esq. (By Mail)
Beryl W. Cohen, Esq. (By Mail)
Tom Wachtell, Esq. (By Mail)
Kim E. Murdock, Esq. (By Mail)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 72-0469-T
(Belchertown)
74-2768-T
(Fernald)
75-3910-T
(Monson)
75-5023-T
(Wrentham)
75-5210-T
(Dever)

ROBERT SIMPSON RICCI, *et al.*
Plaintiffs,

v.

ROBERT OKIN, *et al.*
Defendants,

and related cases.

ORDER

After notice and hearing, and with the consent of the parties, it is hereby ORDERED:

1, This order supplants and replaces each of the consent decrees and all orders of the Court in these matters All such consent decrees and, outstanding orders are hereby vacated and dissolved These five consolidated cases shall be and hereby are closed and removed from the Court's active docket. Any action to enforce the rights of the plaintiff classes may be

brought before the Court only pursuant to the terms of Paragraph 7 below:

2. Defendants shall continue to provide services to the members of the plaintiff class as set forth in this paragraph.

a. The defendants shall substantially provide services to each class member on a lifetime basis. The specific services to be provided to each Class member¹ to meet this obligation, and defining this obligation, shall be set forth in an Individual Service Plan ("ISP") that details each class member's capabilities and needs for services, pursuant to the regulations governing the preparation of ISP's, as currently set forth in 104 CMR 20, *et seq.* (the "ISP

¹ The plaintiff class will be defined as those individuals who have been identified in the Class Member Identification Lists issued as of April 30, 1993, regardless of their current place or residence, or any person who, on or after April 30, 1993, has resided at a state school during more than 30 consecutive days or for more than 60 days during any twelve-month period. Defendants shall maintain a mechanism for keeping track of the identities and locations of current class members, and the occurrence and a history of transfers, which information shall be available to Plaintiffs' counsel. During the first three years following issuance of this Order, defendants shall also transmit notices of the transfer of any class member to a designated representative from that individual's original class. Additionally, notice shall be sent to a representative of the Massachusetts ARC of the transfer of any class member from the original Dever and Wrentham classes.

As of this date, admissions to the state schools are closed; however nothing in this order shall preclude Defendants in the future from adopting a different admissions policy, or from modifying the current policy on admissions.

For purposes of this order, "State School" shall, include Belchertown, Dever, Fernald and Wrentham State Schools and Monson Developmental Center.

Regulations")². Such services shall include, as appropriate for the person, residential, programs; day programs; recreational and leisure time activities; medical, psychological, dental and health-related professional services; respite care and crisis intervention services; support and generic services, such as guardianship and adaptive equipment services; and transportation services.

b. Defendants shall not seek to amend, revise, or otherwise modify the ISP Regulations as they affect class members except upon 60 days written notice to Plaintiffs' counsel, with an opportunity for Plaintiffs to comment upon the proposed changes. Any amendments must leave in place a process that is at least the substantial equivalent of the regulations currently set forth in 104 CMR 20, *et seq.*, with regard to the definition of the ISP, the individualized nature of the ISP, the existence of an appeal process, and the principles contained in footnotes 2 and 3 herein.

c. Sufficient adequately trained and experienced personnel, as reasonably determined by the Department of Mental Retardation based on professional judgment, shall be available to substantially meet the needs set forth in each class member's ISP.

d. Defendants shall maintain certification of state schools under federal Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, and maintain

² These regulations shall guarantee that each class member be provided with the least restrictive most normal, appropriate residential environment, together with the most appropriate treatment, training, and support services suited to that person's individual needs.

compliance with the Department's Title XIX obligations with respect to services in the community, for as long as the state participates in those programs for each facility or service as to which the state receives Title XIX funds.

e. Within nine months of the date of this order, defendants shall enter into an agreement with contracted consultant retardation professionals or with a nationally-recognized evaluation group to review community programs on a periodic basis.

3. a. Defendants shall continue to use the Single Standard Methodology for staffing state schools for five months, or until the implementation of an alternative staffing plan pursuant to the procedures set forth in subparagraph 3(b) below, whichever is later.

b. If the Defendants wish to discontinue use of the Single Standard Methodology, Defendants shall provide to the Governor's Commission on Mental Retardation for its review during at least one meeting an alternative staffing plan that will assure the presence of adequate numbers of appropriately trained staff at each state school sufficient to meet the needs of the individuals who continue to reside there. This alternative staffing plan shall be formulated by the Department of Mental Retardation based on its reasonable, professional judgment and may or may not utilize specific ratios for staff.

4. Defendants shall not approve a transfer of any class member out of a state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent community region) certifies that the individual to be transferred will receive equal or better

services to meet their needs in the new location, and that all ISP-recommended services for the individual current needs as identified in the ISP are available at the new location.

5. Except as set forth in other paragraphs of this Order, nothing in this Order is intended to detract from or limit the discretion of the Defendants in developing and improving programs, managing and determining the personnel and budget of the Department of Mental Retardation and other state agencies, implementing innovative services, improving quality enhancement and dispute-resolution mechanisms, or allocating its resources to ensure equitable treatment of its citizens.

6. Defendants shall continue to seek to improve, and shall not undermine, the progress achieved during the period of this litigation by:

a. Maintaining and implementing the basic principles of the ISP.³

b. Exerting their best efforts to maintain and secure sufficient funds to meet the needs of class members under this order. The defendants shall be

³ These principles, currently in Department of Retardation regulations, are "(1) human dignity, (2) humane and adequate care and treatment, (3) self-determination and freedom of choice to the person's fullest capacity, (4) the opportunity to live and receive services in the least restrictive and most normal setting possible, (5) the opportunity to undergo normal developmental experiences, even though such experiences may entail an element of risk, provided however that the person's safety and well-being shall not be unreasonably jeopardized; and (6) the opportunity to engage in activities and styles of living which encourage and maintain the integration of the client in the community through individualized social and physical environments."

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determined to have met their obligation under this subparagraph if the Defendants have secured and maintained an annual appropriation for the Department of Mental Retardation at least equal to the total gross amount of the actual appropriations for Fiscal Year 1993⁴

7. a. If the Defendants substantially fail to provide a state ISP process in compliance with this Order, or if there is a systemic failure to provide services to class members as described in this order, the Plaintiffs may seek enforcement of the Order pursuant to this paragraph. Individual ISP disputes shall be enforced solely through the state ISP process.

b. Nothing in this Order shall make state law (including but not limited to the ISP regulations) enforceable in federal court, but claims of a failure to provide an ISP process in compliance with this Order or claims of systemic failure to provide ISP services required by this Order may be enforced in this Court, even if such claims also state a violation of state law.

c. Should the Plaintiff class believe that the Defendants are not in substantial compliance with this Order with regard to systemic issues, Plaintiffs may seek to reopen this case and to restore this case to the active docket and to move for enforcement of this Order only after the following steps have occurred:⁵ (1)

⁴ This amount shall be set as follows: Within fourteen days of the final appropriation for the Department of Mental Retardation for Fiscal Year 1993, the Defendants shall file with the Court a certification of the total gross amount of actual appropriations for the Department of Mental Retardation for Fiscal Year 1993 which shall constitute an appendix to this order and shall be incorporated herein by reference.

⁵ The procedures required by this subparagraph will apply except in a situation where serious irreparable harm would

Plaintiffs have given written notice to Defendants of the alleged non-compliance, including the facts alleged and the provision of the Order involved; (2) Defendants have been provided with thirty (30) days to review and respond Plaintiffs' notice, and to inform Plaintiffs of any proposed plan of correction; (3) Plaintiffs and Defendants (or their respective counsel) have met personally at least twice to discuss and seek to resolve any remaining dispute under the notice. The Court shall have jurisdiction to enforce the provisions of this order pursuant to this paragraph, which shall be the exclusive means of enforcing this Order.

d. The matters which may be raised under Paragraph 7.a. above are assertions of future systemic violations of this Order. Nothing in this Paragraph 7 shall be construed to prevent a class member from bringing an independent action in the event that the individual's grievances have not been remedied through existing state procedures.

e. Plaintiffs may not seek to reopen this case based solely on facts known by them as of the date of this Order. Plaintiffs may, however, use existing facts in connection with any assertions of future systemic violations of this Order.

8. This order shall take effect upon written notification to the Court by the Governor that he has issued the Executive Order set forth in Appendix A, which is attached hereto and incorporated herein, and that all members of the Governor's Commission

result if all the requirements were met; in such a situation, Plaintiffs shall give the maximum practical notice and the parties shall comply with all the requirements to the extent possible, given the urgency of the situation.

on Mental Retardation have been sworn and the Administrator has been appointed⁶. The Advisory Panel of the Office of Quality Assurance shall submit its list of Commission member nominees to the Governor within 30 days of the signing of this Order.

9. Defendants shall place the following information describing the rights and services under this order in the permanent record of each class member, shall retain such information on record for so long as the class member is alive, and shall seek to enter such information in the class member's file maintained by all providers of services to class members (and, within one year, by contract require such entry by providers);

a. designation of class membership;

b. notation that class membership results in rights and services guaranteed by this order, and a summary of those rights; and

c. the name, address and telephone number of plaintiffs' counsel, various advocacy organizations, the Department of Mental Retardation, and the Governor's Commission.

The above information shall be reviewed with each class member at that individual's next-scheduled ISP meeting following the effective date of this Order.

Chief Judge

pine/marc/al5

⁶ Upon issuance of this order, the Office of Quality Assurance shall limit its activities to those necessary to transfer its files to the Governor's Commission. It is understood that the Office shall cease all operations upon the appointment of the Administrator of the Commission.

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No. 08-971

Supreme Court, U.S.
FILED
FEB 18 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

ROBERT SIMPSON RICCI, ET AL.,

Petitioners,

v.

DEVAL L. PATRICK, IN HIS CAPACITY AS
GOVERNOR OF THE COMMONWEALTH OF
MASSACHUSETTS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

**BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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Dated: February 18, 2009

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Wrentham Association for Retarded Citizens, Inc. states that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and is not a publicly held corporation that issues stock. It has no parent corporation.

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STATEMENT OF THE CASE

More than 35 years ago, thousands of mentally retarded residents of state facilities in the Commonwealth of Massachusetts filed the first of several federal class actions to remedy deplorable conditions in those institutions. The various cases were consolidated into a single action before the District of Massachusetts (Tauro, J.). After hearing extensive evidence and taking multiple, day-long views of the facilities himself, and requiring state and federal officials to appear and respond to his inquiries, the district court ultimately found that the Commonwealth had violated its obligations to provide constitutional and statutory minimal levels of care. (App. 9-10.) The Commonwealth did not dispute these findings; it consented to the entry of interim decrees by the district court that mandated comprehensive measures to remedy the statutory and constitutional violations. (App. 10.) For more than fifteen years, from 1977 through 1993, the district court actively oversaw and administered those decrees, "conscientiously and with great care." (App. 3.)

On May 25, 1993, the district court endorsed a final consent decree and entered an order, the Disengagement Order, that closed the court's direct oversight of the institutions. The Disengagement Order detailed the Commonwealth's obligations to the current and former residents of the state facilities, and it provided that the case could be reopened in the event of a systemic failure by the Commonwealth to fulfill its obligations under the Order.

In 2004, the Commonwealth decided to remove residents from its institutional facilities. Many of these mentally retarded individuals had lived in these settings for decades, and for some, these institutions were the only homes they had ever known. The Commonwealth's decision to remove residents was driven largely by budgetary considerations; in many cases decisions were made without regard for or contrary to the wishes of the residents themselves and their guardians. In response to multiple petitions, the district court – the same judge who had presided over the case since its inception in 1972 – appointed the United States Attorney for the District of Massachusetts as Court Monitor to investigate the Commonwealth's compliance with the Disengagement Order. After a year-long investigation, the Monitor provided an extensive report. The district court ultimately made factual findings that the Commonwealth had indeed failed, systemically, to comply with the Disengagement Order. Specifically, the Commonwealth made the decision to transfer residents without considering the wishes of the guardians and residents or properly considering whether the new residence could actually provide "equal or better services." This failure was not merely procedural: drawing on the Monitor's investigation and its decades of familiarity with the vulnerable plaintiffs, the court found that such transfers could have "devastating effects" upon their well-being. To remedy this systemic violation, the district court entered a careful and judicious order that required the Commonwealth only to consider, meaningfully, the residents' wishes to remain in the settings where they had lived for decades.

On appeal, the First Circuit showed no deference to the judge, despite his unmatched expertise. Characterizing the case as an abstract question of contract interpretation, the appeals court applied a de novo standard of review and ignored the factual findings on which the district court had based its order. In so doing, the First Circuit exacerbated a split between the circuits on the appropriate standard of review to be applied when a district court applies a consent decree that it had entered and has overseen. The appeals court did not acknowledge this split, which has divided the circuits for years.

This widely publicized case presents this Court with an excellent opportunity to resolve the long-standing split between the circuits on the proper roles of federal courts in administering systemic relief. This issue arises in a broad range of cases: this one involves the rights of the mentally retarded, but it is equally important in other institutional reform cases involving employees, students, and housing recipients who have faced discrimination, prisoners who are incarcerated under cruel and unusual conditions, and businesses and governments that have violated anti-rust and environmental laws. This case, in particular, exemplifies why an appeals court should show some deference to a lower court that has crafted a remedial decree based upon its extensive firsthand familiarity with complex institutional problems.

Consequently, The Wrentham Association for Retarded Citizens, Inc. ("Wrentham Association"), a plaintiff below, now submits this Response to the *Petition for a Writ of Certiorari* filed on January 29, 2009 (the "Petition") to urge this Court to grant the

Petition, issue a writ of certiorari, and reverse the decision of the First Circuit.¹

I. History Of The Case

A. The District Court Has Overseen DMR Operations For Decades.

This case is the latest chapter in a saga that began in 1972, when a class of mentally retarded residents of the Belchertown State School petitioned the District of Massachusetts to remedy conditions that were unconstitutional and unconscionable. After residents of other state facilities filed parallel actions, all of the cases were consolidated before Judge Joseph Tauro.

After hearing extensive evidence and taking day-long views of the facilities himself, the district court ultimately found that the Commonwealth of Massachusetts had violated its obligations to provide constitutional and statutory minimal levels of care. The Commonwealth did not dispute these findings; it consented to the entry of interim decrees by the district court that mandated comprehensive measures to remedy the statutory and constitutional violations.

¹ The Wrentham Association was listed as a petitioner in the Petition, but is filing this Response because it is separately represented in this matter and is the class representative for a different group of individuals than the Paul A. Dever Association for Retarded Citizens, Inc., Fernald Development Center Class members, Belchertown Plaintiffs and Monson Plaintiffs who are also listed in the initial Petition.

The constitutional and statutory violations at the Commonwealth's institutions were pervasive, deep, and complex, not remediable simply by issuing a single order. Accordingly, for more than fifteen years, from 1977 through 1993, the district court actively oversaw and administered various decrees, "conscientiously and with great care." (App. 3.) The court invested thousands of hours, often guided by experts, to learn the workings of the Commonwealth's Department of Mental Retardation ("DMR"), understand the proper standards of care for the mentally retarded residents, and carefully develop a practical, effective, and constitutionally appropriate remedy that could deliver measurable improvements. (App. 48-49.)

Always mindful of the limited role of a federal court in such an endeavor, the district court structured and administered its remedy with the aim of ending its oversight at the first appropriate opportunity. On October 9, 1986, the court entered an order that set out a list of specific tasks for the Commonwealth to accomplish and represented a "step of disengagement" for the court. *Ricci v. Okin*, 978 F.2d 764, 764 (1st Cir. 1992). To facilitate this disengagement, the 1986 Order established the Office of Quality Assurance ("OQA") to oversee the Commonwealth's treatment of the retarded and to "safeguard the health, safety and well-being of Class Members . . ." *Ricci v. Okin*, 646 F. Supp. 378, 381 (D. Mass. 1986). The 1986 Order contemplated the court's final disengagement after three years. *Id.* at 381. The parties themselves agreed several times to extend the Order. *Ricci v. Okin*, 978 F.2d at 764-65.

Finally, more than twenty years after the first suit was filed, the Commonwealth rectified the

deficiencies sufficiently that the district court could take a less active role:

For the past two decades, literally thousands of hours have been devoted to fashioning a comprehensive remedial program that has included multi-million dollar capital improvements, establishment of a responsible program of community placement, as well as significant staffing increases geared to meeting the individual service plans and overall needs of those with mental retardation.

(App. 50.) On May 25, 1993, the district court endorsed a final consent decree and entered an order, the Disengagement Order, that closed the case. (App. 9-10.)

The Disengagement Order detailed the Commonwealth's obligations to the residents of the state facilities. In particular, the Disengagement Order required the Commonwealth to develop and implement an individual service plan ("ISP") for each resident. An ISP sets out in detail the resident's "capabilities and needs for services" such as medical or psychological care. (App. 54); *see generally* 104 Mass. Code Regs. 29.06(2). ISPs are to be drafted after individual meetings between evaluating professionals and clients and their guardians. *See* 104 Mass. Code Regs. 29.06(2)(b). The Disengagement Order required DMR to comply with state regulations governing ISP planning, which are intended to provide an individual and personalized analysis of a resident's needs and to provide residents and their guardians with a voice in

the process. (App. 55, n.2); *see also* 104 Mass. Code Regs. 29.06(2)(a)(2).

The Disengagement Order also prohibited the Commonwealth from transferring a class member "out of a state school into the community, or from one community residence to another such residence, until and unless the Superintendent of the transferring school (or the Regional Director of the pertinent community region) certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that all ISP-recommended services for the individual's current needs, as identified in the ISP, are available at the new location." (App. 57-58.)

To protect the rights of the class members, the Disengagement Order expressly provided that the district court could reassert jurisdiction in the event that the Commonwealth "substantially fail[ed] to provide a state ISP process in compliance with [the] Order," engaged in "a systemic failure to provide services to class members as described in [the] Order," or engaged in "a systemic failure to provide ISP services required by [the] Order." (App. 59-60.)

B. After A Thorough Investigation By The U.S. Attorney, The District Court Made Factual Findings That There Were Systemic Failures To Comply With The Disengagement Order.

Beginning in 2004, the Commonwealth enacted three budget measures that fundamentally changed its approach to caring for mentally retarded

individuals. (App. 6.) Pursuant to those measures, the Commonwealth announced its new policy of closing the state facilities and transferring the residents, primarily to privately run community residences, largely for cost reasons. (App. 7.)

On July 14, 2004 the Fernald Petitioners moved to reopen the case because the Commonwealth had failed systemically to provide services in compliance with the Disengagement Order. The Wrentham Association filed a similar motion on February 7, 2006. Those motions were denied without prejudice on January 20, 2005 and June 7, 2006, respectively. Those rulings were not appealed and were not before the First Circuit. Instead, the district court, sua sponte, appointed the United States Attorney for the District of Massachusetts as an independent monitor to investigate 49 transfers from the Fernald Development Center. (App. 14.)

After a year-long investigation, during which the Monitor "visited DMR Intermediate care facilities and community residences throughout the Commonwealth, surveyed day programs, hired independent medical experts, scoured the medical and departmental records of the transferred individuals, and met with officials, guardians and residents," the Monitor filed an extensive report outlining his findings. (App. 38.) After considering the parties' written comments on the Monitor's report, the district court made factual findings that the Commonwealth engaged in systemic violations of the Disengagement Order by failing to provide a meaningful ISP process that allowed guardians and residents to state their wishes, and by deciding to transfer everyone before meaningfully considering

whether new residences could actually provide "equal or better services."

An essential function of the ISP process is to give residents and guardians a voice in important decisions. It is intended to provide an individual and personalized analysis of each resident. Administering this process under the global declaration that Fernald will be closed, however, eviscerates this opportunity for fully informed individualized oversight. To dismiss the benefit of hearing the voices and wishes of those most directly impacted invites the devastating effects about which the Monitor has warned. The DMR declaration not only disenfranchises the participants in the ISP process, it also deprives the DMR itself of valuable information, thereby undermining the efficacy of the ISP process. As a consequence, such administration of the ISP process amounts to a "systemic failure" to provide a compliant ISP process, within the meaning of the Final Order.

(App. 40 (footnotes omitted).) Consequently, the district court reasserted jurisdiction.

Importantly, the district court's decision was not based upon a construction of disputed terms in the Disengagement Order. It rested, rather, on factual findings that there were systemic violations, which findings were based, explicitly, on "the entire record of this case, the Court Monitor's thorough

investigation, as well as more than three decades of personal oversight of the case and the dozens of 'views' by this court of the subject facilities." (App. 38-39.)

The evidence of record included evidence that even supposedly "voluntary" transfers were the result of misleading and ominous threats to families and guardians that their loved ones had to move, and move quickly, lest they be left with the worst possible housing options. According to the Monitor's report, many of the guardians had in fact "decided to transfer their Wards from Fernald based on the announcement that Fernald will be closing. So they were prompted to consider other locations because of the concern that Fernald would be closed and they wanted to ensure that the best possible option would be available to them and to the residents." 3/7/07 *Transcript*, RA6:1734.²

For instance, Mark Booher, Ph.D., a licensed psychologist with personal and professional experience working with mentally retarded adults, submitted an affidavit describing "scare tactics" and forms of manipulation that were employed by DMR to pressure guardians and families to "voluntarily" move their loved ones. *Booher Aff.*, ¶¶ 3-4, RA1:260.

² The parents of at least one of the transferred residents expressed doubt about their decision to transfer their daughter after she passed away, shortly after the transfer. *Monitor's Report*, RA6:1715. ("RA" refers to the record appendix in the First Circuit.) Notably, their decision to transfer their daughter was driven by the belief – instilled by the DMR – that Fernald's closure would result in the best alternative residences quickly filling up, leaving them with only unacceptable options. *Id.* Their daughter lived at Fernald for 40 years and died within a year of her transfer. *Id.*

Dr. Booher noted that "DMR staff have used, and abused, their positions and power to convince, or force family members to agree to circumvent the ISP process." *Booher Aff.*, ¶ 5, RA1:261. Dr. Booher elaborated:

DMR administration has been trying to circumvent the ISP process by assigning staff to the sole task of talking "informally" with families about placements and completing a "Placement Profile Form" for each resident. . . . Families have reported that [Joe Foley] has used scare tactics: He told them that they had to act quickly because Fernald would close in a few months; he explained that by acting now, they could get a good placement; and he warned them that the most caring decision they could make was to move their family member now so they would not have to endure declining services as Fernald was closing. Many of the family members he deals with are over 70 years of age and had relied on him for years for advice to help their relatives. ... family members have been afraid of personally filing a complaint ... because they feared personal retribution. Joe Foley and DMR might challenge their guardianship, as has been done to family members in the past when they did not agree to what DMR wanted to do. They were also afraid of retribution through their vulnerable Fernald family members.

Regrettably, Joe Foley is not the only Fernald staff person using such scare tactics to persuade guardians about transfer....

Booher Aff., ¶ 5, RA1:261-62.

Even while the US Attorney was investigating the transfers in 2006 and 2007, the pressure continued. The Fernald Plaintiffs presented a sample of the type of letter that had been sent to guardians for at least 6 months, which stated in part: "As you know, Fernald . . . is closing and remaining at the facility will no longer be an option for the named person." 3/7/07 *Transcript*, RA6:1747-48. The district court understood the effect of such a letter:

You are talking to people who are so afraid that whatever little thing they have got left going for them, it will be taken away. They won't argue with anybody no matter what they say to them. . . . You are dealing with people who are frightened.

...
[Y]ou know that the pressure has been there, that there have been . . . I can't tell you how many letters I've had, how many times we've had meetings like this where people have reported to me that notwithstanding the prohibition, there have been these suggestions made, intimidations made, attempts at intimidation made to let somebody know you better move fast because the ship is sailing.

3/7/07 Transcript, RA6:1758-59. Drawing upon this evidence and intimate familiarity with the facilities at issue, the district court reached the conclusion –“a conclusion that should be apparent to anyone who has visited Fernald” (App. 39) –that a transfer could be “devastating” for the individuals still residing at Fernald.

Given this documented evidence of subtle and not-so-subtle intimidation, the district court recognized that the residents and guardians were effectively being disenfranchised in the ISP process, and that this problem was systemic as it permeated the ISP process for all of the Fernald residents. (App. 39-40.)

Consequently, on August 14, 2007, the district court entered an order that was narrow, circumscribed, and judicious, one that focused specifically upon the communications between the Commonwealth and guardians and residents:

Any further communication from Defendant Commonwealth of Massachusetts Department of Mental Retardation to Fernald residents and their guardians which solicits choices for further residential placement shall include Fernald among the options which residents and guardians may rank when expressing their preferences.

(the “2007 Order,” App. 42.) The Commonwealth and First Circuit suggest that this order required Fernald and other institutions to remain open in perpetuity, but this suggestion is flatly contradicted

by the district court's order itself: "The purpose of today's order is not to interfere with closure, but to make sure alternative placement decisions properly start with the needs and wishes of the individual resident, rather than an inflexible global closure policy." (App. 43-44, n.17.) Far from requiring the Commonwealth to open or close any particular facility, the 2007 Order simply required DMR to allow individuals and guardians to express their preference to remain at Fernald. At the conclusion of the ISP process, it might ultimately be determined that another setting could provide "equal or better services," but at least those discussions would not begin with foregone conclusions and pre-judgments that were made without true consideration of the individuals' needs.

C. The First Circuit Showed No Deference To The District Court's Decades Of Experience Or Factual Findings.

On October 1, 2008, the First Circuit reversed the 2007 Order and dismissed the case for lack of jurisdiction.³ After emphasizing the sound budgetary reasons for closing Fernald, the appeals court's decision treats the proceedings in the district court as simply a question of contract interpretation:

The terms of the consent decree embodied in the Disengagement Order, like any contract construction issue,

³ The First Circuit entered an Amended Judgment on November 18, 2008 to clarify that the 1993 Disengagement Order remains in full force and effect. (App. 80-81.)

present an issue of law that we review de novo. See generally F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R., 449 F.3d 185, 192 (1st Cir. 2006). Our view of the proper construction is different from the district court's.

(App. 21) The appeals court paid no heed to the extensive factual findings by the Monitor and the district court; although it praised the district court for its three decades of administering the case "conscientiously and with great care," the appeals court showed no deference whatsoever to the court's hands-on experience. It concluded that the DMR was conducting ISP proceedings, and that "this individualized process . . . cannot constitute a 'systemic failure'" (App. 27) – a non sequitur, particularly in view of the Monitor's and district court's express findings that these individualized processes were conducted, systemically, in a way that prevented a truly personalized assessment of residents' needs.

REASONS FOR GRANTING CERTIORARI

Federal appeals courts have divided sharply over the amount of deference to show to a district court that is interpreting or applying its own prior consent decree. Some circuits show no deference, reasoning that the district court's order is essentially a written contract that should be reviewed de novo as a pure question of law. But this approach is based upon a flawed analogy. A private contract is negotiated between two parties, and the court – a stranger to the transaction – must discern the parties' intent from the language that they used to

express it. In the context of a consent decree, and particularly a consent decree entered in a case involving public institutions, the trial court almost inevitably participated in fashioning the decree. As a participant, the court typically has firsthand knowledge and experience of the object and intent of the decree. Moreover, the application of a consent decree often involves more than the mere interpretation of unambiguous terms in the decree, but the application of those terms to a complex factual situation with which the court has developed unique familiarity. Sensitive to these realities, several circuits have correctly determined that the district court's application and interpretation of its prior decree is entitled to some deference.

This case exemplifies these realities and casts in stark relief why at least a modicum of deference to the district court is warranted. The Disengagement Order was not negotiated solely between parties to a private transaction; the court was an active participant and moving force, with its input drawn from decades of experience with the complex institutional problems to be remedied by the decree. The 2007 Order likewise was not merely a construction of plain language, but required the application of the Disengagement Order to facts that were found after comprehensive investigations. The First Circuit's "de novo" review fundamentally mischaracterized the nature of the issue before it and ran roughshod over the thorough and well supported findings made by the Monitor and the district court.

Ultimately, the issue presented by the Petition is profoundly important, because it speaks directly to the role of federal courts in cases of broad

public significance. This particular case affects the rights of thousands of vulnerable class members who are still supposed to be protected by the 1993 Disengagement Order, and thus has attracted enormous public attention.⁴ Other cases in which

⁴ See, e.g., Shirley Barnes, *State will Retain a Presence at Center: Closing in 2013 Worries Town*, Worcester Telegram & Gazette, Jan. 28, 2009, at B3; Nancy Gonter, *Kin of Disabled Start New Fight*, The Republican (Springfield, MA), Jan. 11, 2009, at A1; Brian Benson, *Scramble to Protect State Sites: Fernald, Glavin are Slated to Close*, Boston Globe, Jan. 1, 2009, at T1; Richard Conn, *Governor: Fernald Center to Close its Doors by 2010*, Daily News Tribune, Dec. 14, 2008; Matt Viser, *State will Shutter Fernald, 3 Others*, Boston Globe, Dec. 13, 2008, at B1; John R. Ellement, *Ruling Restarts Fernald Closure: Critics Vow Battle to Keep it Open*, Boston Globe, Oct. 2, 2008, at B2; Richard Conn, *State Files Fernald Appeal*, Daily News Tribune, March 20, 2008; Adrian Walker, Op-Ed, *Do Nothing is a Better Fix*, Boston Globe, Feb. 29, 2008, at B1; Adrian Walker, Op-Ed, *Fernald's Future*, Boston Globe, Sept. 25, 2007, at B1; Eric Moskowitz, *Families Challenge Fernald Plan, Concern Voiced for Mentally Retarded*, Boston Globe, Sept. 25, 2007, at B2; Nicole Haley, *Guardians Stand Fast on Fernald*, Daily News Tribune, Sept. 23, 2007; Editorial, *Don't Appeal Fernald Ruling*, Boston Globe, Sept. 20, 2007, at A10; Shelley Murphy, *State to Appeal Fernald Ruling*, Boston Globe, Sept. 13, 2007, at B3; Glen Johnson, *Patrick Pushes to Close Health Facility*, The Republican (Springfield, MA), Sept. 13, 2007, at B6; Nicole Haley, *Candidates Mull Future of Fernald*, Daily News Tribune, Sept. 13, 2007; Editorial, *Fernald Preserved, but at a Premium*, Boston Herald, Aug. 16, 2007, at 28; Editorial, *The Folly of Closing Fernald*, June 6, 2007, Boston Globe, at A14; Jack Meyers, *Fernald Families Rip Plan to Close Facility*, Boston Herald, Feb. 28, 2005, at 8; Franci Richardson, *Fernald Families Ask Judge to Intervene*, Boston Herald, July 15, 2004, at 27; see also *Hearing Held Over Transfer of Patient from Fernald Developmental Center*, Feb. 26, 2008 New England Cable News video available at <http://www.necn.com/Boston/New-England/Hearing-held-over-transfer-of-patient-from-Fernald/1204065197.html> (reporting on dispute related to resident transferred against her will);

the issue arises present different factual circumstances, but virtually all involve the use of a consent decree as a tool to vindicate public rights and to effectuate institutional reform.

I. This Court's Guidance Is Important Because The Issue Presented By The Petition Arises Frequently In A Broad Range Of Cases Where Federal Courts Are Overseeing State And Public Institutions.

As the First Circuit itself has acknowledged, "[d]ifferent types of consent decrees are ordinarily conceived and hatched in markedly different ways." *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1338 (1st Cir. 1990). While some consent decrees are simply "born by agreement of the parties and only [affect] their rights and liabilities," others can "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." *Heath v. DeCourcy*, 888 F.2d 1105, 1109 (6th Cir. 1989). While the principal cases representing the Circuit split

Battle Over Mental Health Center Goes to Court, Sept. 4, 2008 New England Cable News video available at <http://www.necn.com/Boston/Health/Battle-over-mental-health-center-goes-to-court/1220479668.html> (reporting on First Circuit hearing); *Fight for Fernald Goes to Supreme Court*, Feb. 3, 2009 New England Cable News video available at <http://www.necn.com/Boston/New-England/2009/02/03/Fight-for-Fernald-goes-to-the/1233701402.html> (reporting on Petition for Writ of Certiorari); *Fate of Waltham School for Mentally Retarded Up in Air*, March 7, 2007 WBZ-TV video available at <http://wbztv.com/video/?id=29455@wbz.dayport.com> (reporting on US Attorney's investigation).

presented here cut across a wide swath of factual and legal contexts, many of them share a common thread in that they involve consent decrees that affect the rights of many more than just the parties involved. Thus, the split impacts important rights across a broad legal spectrum, and the importance of resolving the split is much more than an academic question of appellate review. Rather, it is essential to the consistent administration of justice across this country.

Circuit court decisions involving consent decrees thoroughly illustrate this point. In *David C. v. Leavitt*, 242 F.3d 1206 (10th Cir. 2001), the appeals court applied a de novo review to a district court's application of a prior consent decree entered to remedy federal constitutional and statutory violations in Utah's administration of its child welfare system. *Id.* at 1207. The consent decree at issue set forth ninety-three substantive provisions with which the State was required to comply, including "obligations to investigate reports of child abuse or neglect within specific deadlines; provide placement support services for foster parents; and ensure that foster children attend school and receive medical and dental treatment." *Id.* at 1208. Similarly, in *Thompson v. U.S. Dep't of Housing and Urban Dev.*, 404 F.3d 821 (4th Cir. 2005), a class of African-American public housing residents suffering from racial segregation and discrimination in the Baltimore public housing system entered into a consent decree with the United States Department of Housing and Urban Development and several local officials to make available nearly one thousand desegregated housing units. When, nearly seven years after the entry of the consent decree, the defendants had only managed to supply eight of the

required units, the district court entered an order extending its oversight of the desegregation plan. *Id.* at 825. The Fourth Circuit affirmed, stressing the importance of giving deference to the district court in the public law context. *Id.* at 834.

In addition to these examples, the significant and varying factual contexts in which appeals courts have reviewed a district court's administration of a consent decree include cases involving: the rights of the mentally retarded (*Gates v. Gomez*, 60 F.3d 525 (9th Cir. 1995); *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325 (1st Cir. 1990); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir. 1983)); recipients of unemployment insurance benefits (*Barcia v. Sitkin*, 367 F.3d 97 (2d Cir. 2004)); prison reform (*Rufo v. Inmates of Suffolk County Jail*, 502 US 367, 381 (1992); *Alberti v. Klevenhagen*, 46 F.3d 1347 (5th Cir. 1995); *Heath v. DeCourcy*, 888 F.2d 1105 (6th Cir. 1989)); environmental protection actions (*United States v. Alshabkhoun*, 277 F.3d 930 (7th Cir. 2002); *United States v. Knot*, 29 F.3d 1297 (8th Cir. 1994)); gaming rights for Indian tribes (*Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367 (6th Cir. 1998)); anti-trust litigation (*United States v. Broadcast Music, Inc.*, 275 F.3d 168 (2d Cir. 2000)); and civil rights and employment discrimination (*Reynolds v. McInnes*, 338 F.3d 1201 (11th Cir. 2003) (employment discrimination); *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transit Authority*, 263 F.3d 1041 (9th Cir. 2001) (racial discrimination); *Huguley v. General Motors Corp.*, 52 F.3d 1364 (6th Cir. 1995) (employment discrimination)).

The issue presented by the Petition, simply put, affects cases of broad public importance, usually involving the delicate relationship between federal judges and state institutions, and where federal courts are making decisions regarding the rights and lives of countless individuals. Given this context, guidance from this Court is essential to ensure clarity and uniformity throughout the federal court system.

II. Because This Court Has Emphasized The Importance Of Showing Deference To A District Court In Modifying Its Own Decree, A Court's Interpretation Or Application Of Its Decree Should Be Shown At Least As Much Deference.

Those circuits that have applied a deferential standard of review to a district court's administration of a consent decree have recognized that decrees governing institutions are different in kind from agreements reached between private parties. *See, e.g., Heath v. DeCourcy*, 888 F.2d 1105, 1109 (6th Cir. 1989) ("consent decrees which regulate institutional conduct are fundamentally different from consent decrees between private parties . . . [because] they affect more than the rights of the immediate litigants").

Indeed, this Court has itself emphasized that a district court is entitled to considerable discretion in modifying a consent decree in a case involving institutional reform. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 381 (1992) (adopting flexible standard for addressing whether district court properly modified consent decree in

institutional reform case). Placing the modification power in the institutional reform context, this Court specifically referred to “[t]he experience of the district and circuit courts in implementing and modifying such decrees [as demonstrat[ing] that a flexible approach [to modification] is often essential to achieving the goals of reform litigation.” *Id.* Concurring in *Rufo*, Justice O’Connor stated: “[o]ur deference to the District Court’s exercise of its discretion is heightened where, as here, the District Court has effectively been overseeing a large public institution over a long period of time.” *Id.* at 394.

Thus, even those circuits that embrace a *de novo* review of a district court’s application and interpretation of a consent decree have recognized this difference in cases involving modification of a consent decree. Every circuit reviews a district court’s decision to modify a consent decree under an abuse of discretion standard. *See, e.g., Thompson v. U.S. Dept. Housing & Urban Dev.*, 404 F.3d 821 (4th Cir. 2005) (“We review the district court’s decision to modify the Consent Decree for abuse of discretion”); *Joseph A. et al. v. Ingram et al.*, 275 F.3d 1253, 1267 (10th Cir. 2002) (same); *Parton v. White*, 203 F.3d 552, 555-56 (8th Cir. 2000) (discretionary review of Rule 60(b)(5) motion); *Holland v. N.J. Dep’t of Corrections*, 246 F.3d 267, 277-78, 282 (3rd Cir. 2000) (rejecting deferential *de novo* review but acknowledging power to modify decree); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1365 (5th Cir. 1995) (court’s discretion to modify consent decree extends to *sua sponte* modifications); *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1017 (6th Cir. 1994) (“This court reviews a district court’s modification of a consent decree under an abuse of discretion standard.”); *Duran v. Elrod*, 760 F.2d 756,

762 (7th Cir. 1985); see also *In re Pearson*, 990 F.2d 653, 658 (1st Cir.1993) (affirming *sua sponte* decision to appoint master to investigate compliance with consent decree based, in part, on court's ability to modify a consent decree).

The First Circuit's own jurisprudence (unacknowledged by the appeals court below) highlights this contextual difference: it suggests a generally applicable "rule of broad discretion in public interest cases." *Navarro-Aya'a v. Hernandez-Colon*, 951 F.2d 1325, 1338 (1st Cir. 1990) (discussing prior cases involving deference to district court's discretion). As stated by the First Circuit:

In public law litigation, courts typically play a proactive role—a role which can have nearly endless permutations.... Frequently, the trial court's adjudicative function blends with its service as an instrument for change. In overseeing broad institutional reform litigation, the district court becomes in many ways more like a manager or policy planner than a judge. Over time, the district court gains an intimate understanding of the workings of an institution and learns what specific changes are needed within that institution in order to achieve the goals of the consent decree.

Id. Nevertheless, the First Circuit applies a de novo standard in reviewing a district court's interpretation and application of a consent decree. *Id.* at 1340.

This intimate understanding gained by the district court is precisely why other circuits give deference to a district court's interpretation of a consent decree. See *Foufas v. Dru*, 319 F.3d 284, 286 (7th Cir. 2003) (acknowledging that while judges are not often the actual authors of the consent decrees they oversee, their presence at the creation of such a decree "may [provide them] insights into the meaning of the decree . . . that are denied to the appellate judges who review the judge's decision."); *Labor/Community Strategy Ctr. v. Los Angeles County Metro. Transit Auth.*, 263 F.3d 1041, 1048 (9th Cir. 2001) ("we must give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal."); *Gates v. Gomez*, 60 F.3d 525, 530 (9th Cir. 1995) (indicating deference appropriate where case had been under supervision of same district judge since inception); *Huguley v. General Motors Corp.*, 52 F.3d 1364, 1370 (6th Cir. 1995) (giving weight to district court's interpretation "in light of its experience of dealing with this class action for a period of more than ten years."); *Brown v. Neeb*, 644 F.2d 551, 558 n. 12 (6th Cir. 1981) ("[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it.").

Given this Court's guidance in *Rufo* and the instruction that lower courts may consider "the circumstances surrounding the formation of the consent order" when interpreting a consent decree, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975), it is simply common sense that "[i]f those circumstances are known to the judge at first hand, his interpretation comes to the reviewing

court with added weight.” *Foufas*, 319 F.3d at 286. It makes no sense that a different, less deferential standard of review should apply to the application and interpretation of a consent decree than its modification; if anything, a district court’s order interpreting and applying an existing consent decree should be entitled to *greater* deference than an order modifying it – particularly in the public law context where “the consent decree provides for a complex ongoing regime of performance rather than a simple, one-shot, one-way transfer . . . [and] prolongs and deepens, rather than terminates, the court’s involvement with the dispute.” *Navarro-Ayala*, 951 F.2d at 1338.

This case presents an excellent example of the deep experience that district courts acquire in institutional reform cases, and it highlights the reasons why this Court should resolve the circuit split in favor of a deferential standard. First, the case concerns constitutional violations and remedies in a complex institutional setting, a factor that the First and Fourth Circuits have weighed in favor of deference. See *F.A.C., Inc. v. Cooperativa de Seguros de Vida de Puerto Rico*, 449 F.3d 185, 192 (1st Cir. 2006) (citing *Navarro-Ayala*, 951 F.2d at 1337-38); *Thompson*, 404 F.3d at 827 (4th Cir. 2005). In addition, the district court in this case has been presiding over this case from its inception more than thirty-five years ago and has entered and overseen interim and final consent decrees. The Sixth, Seventh, Eighth and Ninth Circuits have found that this factor weighs in favor of deference. See *Foufas v. Dru*, 319 F.3d at 286 (7th Cir. 2003); *Gates v. Gomez*, 60 F.3d at 530 (9th Cir. 1995); *Huguley v. General Motors Corp.*, 52 F.3d at 1370 (6th Cir. 1995);

United States v. Knote, 29 F.3d at 1300 (8th Cir. 1994).

Indeed, the district court here has already grappled, successfully, with the very issue that led to the reopening of the case. In 1991, the Commonwealth announced that the Paul A. Dever State School ("Dever") would be closed within three years. *Ricci v. Okin*, 781 F. Supp. 826, 827 (D. Mass. 1992). That announcement aggravated existing deficiencies in the delivery of services to Class Members residing at Dever, by leading to increased employee absenteeism, the loss of significant staff members and leadership, and an overall reduction in the quality of services delivered to the Dever residents. *Id.* Taken together, the problems at Dever were so serious that the facility faced the threat of losing its federal funding and Medicaid certification if the situation did not improve. *Id.*

The district court did not prevent the eventual closing of Dever, but recognized that it must "once again clarify the defendants' obligations to Class Members in proceeding with development of plans for implementing the Governor's various proposals to consolidate facilities for the mentally retarded." *Ricci*, 781 F. Supp. at 827. The court identified the overarching principle that has applied consistently throughout this long litigation: it is DMR's duty to "assess the needs of [Class Members] on an individual, as opposed to wholesale, basis." (App. 39.) Thus, the court required that "[i]n order to close Dever, or any other Consent Decree facility, the defendants must assure this court that they will meet each Class Member's needs, as specified in his or her ISP." *Ricci*, 781 F. Supp. at 828. Accordingly, "[r]ecommendation as to . . . placement [must be]

based on evaluation of the actual needs of the resident or client rather than on what facilities and programs are currently available." *Id.* at 827 n.4. The court specifically required "[a]ppropriate mechanisms . . . to provide Class Members and their families with due process rights regarding all ISP decisions, including transfer decisions." *Id.* at 830.

An appellate court simply is not in a position to understand these complex cases as deeply and broadly as the district courts that have immersed themselves in them for years. In view of these realities, this Court should resolve the conflict between the circuits and re-emphasize the importance of showing deference to the district court.

III. The First Circuit Reviewed The 2007 Order "De Novo," Even Though The Order Was Necessarily Predicated On Factual Findings.

In this case, the district court's 2007 Order was entitled to even greater deference, not just because of the court's unique experience and perspective, but because it rested upon explicit factual findings. Those findings were based upon an independent investigation by the U.S. Attorney's office and upon the district court's decades of familiarity with the complex institutions under review.

In reviewing the 2007 Order, the First Circuit simply substituted its own judgment for that of the district court. Treating the issue before it as an abstract question of law, the First Circuit purported

to interpret the provisions of the Disengagement Order. But the district court's 2007 Order reopening the case was expressly predicated upon factual findings that the "DMR failed to discharge its ISP duties" (App. 23), among others. These findings were well-grounded in an extensive record: the comprehensive investigation conducted by the United States Attorney, the evidence of coercion and intimidation presented to the court, and the district court's decades of experience and intimate familiarity with the state institutions and vulnerable population before it. *See, e.g., Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987) (district court "has the personal knowledge, experience, and insight necessary to evaluate the parties' intentions, performances and capabilities."). Most disturbingly, the First Circuit – despite the evidence in the record – simply rejected the possibility of any such intimidation. (App. 28 n.9.) This was error. *See, e.g., Amadeo v. Zant*, 486 U.S. 214, 228 (1988) (there "is no excuse for the Court of Appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate factfinding.").

The district court's factual findings should have been reviewed deferentially, for clear error. *See* Fed. R. Civ. P. 52(a); *see, e.g., Anderson v. City of Bessemer, North Carolina*, 470 U.S. 564, 574-75 (1985) ("The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."). This standard is fully applicable in the context of a consent decree. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) (Rule 52(a) "does not make exceptions or

purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. . . . [and] whether the differential impact of the seniority system reflected an intent to discriminate on account of race" is a pure question of fact).

The First Circuit's failure to apply the appropriate standard of review to the facts found by the trial court was error, one that creates another conflict among the circuits. *See Kendrick v. Bland*, 931 F.2d 421, 423-24 (6th Cir. 1991) (district court's factual findings that consent decree was violated are reviewed for clear error); *see also Labor/Community Strategy Ctr. v. Los Angeles Metro. Transit Auth.*, 263 F.3d 1041, 1048 (9th Cir. 2001) ("This court reviews de novo the district court's interpretation of the consent decree, but must defer to the district court's factual findings underlying the interpretation unless they are clearly erroneous.").

CONCLUSION

For more than three decades, the district court has carefully, conscientiously, and effectively administered its decrees regulating the DMR. Over that extended period, the district court gained unique insight and unmatched experience in the complex dynamics between the Commonwealth's administrative institutions and the mentally retarded residents who lived in state facilities. Drawing upon that insight and experience and an extensive factual record, the district court found systemic violations of its 1993 Disengagement Order.

As a remedy, the court entered a carefully limited order that targeted the identified violations.

In reviewing the district court's order, the First Circuit applied the wrong standards, failing to show the level of deference to the district court that this Court's precedents require. The First Circuit's decision deepens a split between the circuits on a matter of significant importance throughout the federal judiciary. Accordingly, this Court should grant the Petition, issue a writ of certiorari to the First Circuit, and vacate and reverse the First Circuit's decision.

Respectfully submitted,

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In The

Supreme Court of the United States

ROBERT SIMPSON RICCI, et al.,

Petitioners,

v.

DEVAL L. PATRICK, in his capacity as Governor
of the Commonwealth of Massachusetts, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

**PETITIONERS' REPLY BRIEF TO BRIEF
IN OPPOSITION BY RESPONDENTS
MASSACHUSETTS ASSOCIATION FOR RETARDED
CITIZENS AND THE DISABILITY LAW CENTER**

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**PETITIONER'S REPLY BRIEF IN SUPPORT
OF PETITION FOR CERTIORARI**

Preliminary Statement

Respondents Massachusetts Association for Retarded Citizens and the Disability Law Center (together "MARC") have filed a brief in opposition to the Petition for Certiorari filed by Petitioners. One other Respondent (Appellee below) Wrentham Association for Retarded Citizens, Inc., has filed a brief in support of the petition. Another group of Respondents (Deval L. Patrick, Governor of the Commonwealth of Massachusetts, the Massachusetts Department of Mental Retardation, its Commissioner, Elin Howe, and Judyann Rigby, Secretary of the Executive Office of Health and Human Services of the Commonwealth of Massachusetts) have waived their right to file an opposition.¹

In their Opposition to the petition, the MARC Respondents raise three issues: (1) they claim that, in their submissions to the First Circuit, Petitioners did not raise the issue of the proper standard of review to be applied to the district court decision; (2) they claim that there is no conflict among the Circuits on the

¹ In addition, an amicus brief in support of the Petition was filed by the Voice of the Retarded, a national organization devoted to advocacy of equal rights for all retarded persons, regardless of their residence.

standard of review of a district court's interpretation of a consent decree, and (3) they claim that the District Court erred in requiring the Fernald Development Center to be kept open, contrary to the requirements of the Consent Decree in this case.

The MARC Respondents are incorrect in their assertion that the issue of the proper standard of review was never mentioned below. In addition, there is a very decided split in the Circuits on the deference to be given a district court's interpretation of a consent decree.

And finally the district court did not require that Fernald be kept open indefinitely, but merely that the guardians of the retarded persons may state a preference that they remain at Fernald as an option, which preference was not enforceable or mandatory upon the Department of Mental Retardation. That preference would be recognized when the DMR solicited choices for further residential placements, and it mandated that Fernald be part of the discussion in the ISP process for families that express such a preference.

I. The Issue of the Standard of Review to be Applied by the Court of Appeals to the District Court's Interpretation of a Consent Decree Was Raised Below.

The MARC Respondents are incorrect in asserting that Petitioners did not argue for a

deferential standard of review before the First Circuit.

On appeal, Petitioners argued that the finding of a “systemic failure” to provide services to mentally retarded persons justifiably triggered reassertion of the district court’s jurisdiction. That finding was based upon the Court Monitor’s factual analysis of the situation and the District Court’s direct knowledge of the meaning of its own order. Its reassertion of jurisdiction was dependent upon, and therefore ancillary to, the entry of the DO. Thus Petitioners argued in their appeal brief:

this [appeal] court must then decide whether the judge abused his discretion by concluding that it was appropriate to reopen the matter [citing *Jenkins v. Kansas City Missouri School Dist.* 516 F.3d 1074 (8th Cir. 2008)]. *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 64 (2d Cir. 1991). *To the extent that the judge’s conclusion rests on his factual findings, in order to show an abuse of discretion, the Commonwealth must demonstrate that those findings were clearly erroneous.*

Brief for the Plaintiffs-Appellees, First Circuit, Docket Nos. Nos. 07-2522 and 07-2523, at 22-23 (emphasis added)

The Wrentham Appellees made the same point in their brief to the First Circuit:

A district court enjoys broad discretion to fashion equity decrees, and possesses the inherent power to enforce its own orders. . . . Where such orders are directed at implementing institutional reform, such as this case, circumstances demand that "judicially-imposed remedies [remain] open to adaptation . . . [and] improvement when a better understanding of the problem emerges." *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir. 1983)

The brief continued:

Accordingly, appellate review of an order entered to enforce a prior decree is necessarily narrow, especially in institutional reform cases, and a trial court's decision to enter such an order is reviewable only for an abuse of discretion. *See Rufo [v. Inmates of Suffolk County Jail]*, 502 U.S. [367] 393 [(1992)] (O'Connor J., concurring) (describing abuse of discretion standard as applied to modification of institutional reform consent decree.)

Brief of Plaintiff-Appellee Wrentham Association for Retarded Citizens, Inc. First

Circuit, Docket Nos. 07-2522 and 07-2523, at 25-26.

Thus the issue of the standard of review of a district court's interpretation of a consent decree in institutional reform cases was certainly presented to the First Circuit.

As noted in the Petition, the DO provided that no transfers of patients would be allowed from one mental retardation facility to another unless the relevant state official "certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that all ISP-recommended services for the individual's current needs as identified in the ISP are available at the new location." (DO, par. 4, App. 57). The DO also provided that:

7. a. If the defendants substantially fail to provide a state ISP process in compliance with this Order, or if there is a systemic failure to provide services to class members as described in this Order, the plaintiffs may seek enforcement of the Order pursuant to this paragraph. Individual ISP disputes shall be enforced solely through the state ISP process. (App. 59-60).

In 2003, the Commonwealth announced that it was planning to close the Fernald Development Center. Complaints were made that such a

move would constitute a "systemic failure" to provide necessary services and a proper ISP process. The district court then appointed the United States Attorney as a court monitor to make factual findings on that issue. After more than a year of "exhaustive and meticulous study" of all alternative facilities, the Court Monitor concluded in a March 6, 2007 report that "Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an 'equal or better' service outcome." (App. 37-38).

The District Court reviewed the report and the Monitor's conclusion that "for some Fernald residents, a transfer 'could have devastating effects that could unravel years of positive non-abusive behavior,'" (App. 39-40). The District Court concluded that "the Commonwealth's stated . . . judgment that Fernald should be closed had damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis." (footnote omitted)(App. 39).

Thus, based on the Court Monitors' finding, and its interpretation of its own disengagement order, the District Court found that the Commonwealth had engaged in a "systemic failure" to provide a compliant ISP process," reasserted jurisdiction over the case

and issued a mandatory injunction to remedy this failure: (App. 40). He noted that:

As this court oversaw entry of the Final Order, it is uniquely competent to declare that "systemic" simply was intended to have its plain dictionary meaning—"of or relating to a system." Webster's II New College Dictionary 1120 (2001). Accordingly, a systemic failure need not be catastrophic in and of itself. Rather, it may simply be a problem of any magnitude, which manifests itself on a system-wide basis, across a number of ISP processes (App. 41).

The District Court's conclusion in this institutional reform case should be subject to deferential review, as five other Circuits have held, and as the First Circuit itself suggested in an earlier decision *See Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1337-38 (1st Cir.1991) (exception from *de novo* review for "public interest" consent decrees).

II. There Is a Split in the Circuits on the Issue of the Standard of Review to be Applied to a District Court's Interpretation of a Consent Decree That It Entered and Administered Over a Period of Time, Particularly in Institutional Reform Cases

Initially the MARC Respondents make the bizarre argument that the District Court was interpreting state law and not the words of the consent decree and such an interpretation of state law must be reviewed *de novo*. However, neither the district court nor the Court of Appeals thought they were interpreting any provision of state law. The parties agreed that an individualized process was required under the state ISP procedure. The entire discussion by the Court of Appeals focused on whether the specific terms of the DO were violated, namely the "systemic failure" language. The exact words or reach of the ISP process were simply not a factor in the lower courts' decision.

The MARC Respondents beg the question when it asserts that "Every Circuit Court Applies a De Novo Standard in Reviewing a District Court's Interpretation of the *Unambiguous* Provisions of a Consent Decree." But there is either a *de novo* standard or there is a deferential standard to be applied by an appeal court. By introducing the term "unambiguous" in its analysis, Respondents obscure the issue to be presented. If the consent decree is truly "unambiguous" then a court of appeals will reverse a contrary decision under either standard. But an appeal court must decide the standard of review before it decides whether any term of the consent decree is ambiguous or not.

In any event, Respondents are wrong in asserting that there is no split in the Circuits. The First Circuit itself agreed that such a split exists, see *F.A.C. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192. n. 4 (1st Cir. 2006), where the court noted the split in authority on the standard of review between the Third and Sixth Circuit. See also *Holland v. N.J. Department of Correction*, 246 F.3d 267, 277-78 (3d Cir. 2001) where the Court cited a series of cases that applied a deferential standard:

Because of the hybrid contractual/court order status of a consent decree, there is some confusion in the courts (and disagreement among the parties) as to what standard of review we should apply here. NJDOC states that our review is simply plenary, [citing *United States v. Board of Education of Chicago*, 717 F.2d 378, 382 (7th Cir.1983) which seemed to apply both standards] . . .

The Court then noted the holdings of other Circuits that applied a deferential standard.

See, e.g., Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 371-72 (6th Cir.1998) (holding that "deferential de novo" is the proper standard of review for a district court's interpretation its a consent decree); *Goluba v. School Dist. of Ripon*, 45 F.3d 1035, 1037-38 & n. 5 (7th Cir.1995)

(applying deferential de novo review to district court's interpretation of a consent decree, and noting further that abuse of discretion review is appropriate where "the judge oversaw the consent decree for an extended period of time and the decree is particularly complex or intricate"); *Officers for Justice v. Civil Serv. Comm'n*, 934 F.2d 1092, 1094 (9th Cir.1991) (applying deferential de novo review); *Berger v. Heckler*, 771 F.2d 1556, 1576 n. 32 (2d Cir.1985) (applying deferential de novo because "few persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it").

Legal commentators have also noted such a split. See Childress & Davis, *Federal Standards of review* § 2.23, at 2-141 (discussed in Amicus Brief of Voice of the Retarded at 8.)

Respondents totally misstate the holding of other courts. Thus they argue that the Ninth Circuit did not apply a deferential standard in *Nehmer v. Veterans Administration*, 284 F.3d 1158, (9th Cir. 2002), stating that the court simply looked at the plain language of the decree. But the Court in fact applied a deferential standard and concluded that the district court's decision was correct. The fact that a court agrees with the interpretation of

the lower court does not mean that no deference was given to the lower court decision.

Thus in *Huguley v. General Motors Corp.*, 999 F.2d 142, 146 (6th Cir. 1993), the Sixth Circuit relied upon "the well established principle that a district court's interpretation of its consent decrees is entitled to substantial deference on appeal. Such deference is required because, '[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it.' *Brown v. Neeb*, 644 F.2d 551, 558 n. 12 (6th Cir.1981)." Subsequently the court upheld the district court's interpretation. It stated: "as previously noted, Judge Feikens' interpretation of the scope of the consent decree is entitled to considerable deference on review." *Id.* at 148. It then noted: "The express language used and the district court's interpretation of the consent decree language, after full discussion and negotiation, lead us to that conclusion [reached by the district court.]" *Id.* Finally the Court of Appeals held: "We, accordingly, **AFFIRM** the decision and injunction of the district court. We find no *abuse of discretion* under the circumstances." *Id.* at 149. (emphasis added).

It is impossible to argue that the Sixth Circuit was not applying a deferential standard, indeed an abuse of discretion standard, under these circumstances.

III. The District Court's Order Did Not Contemplate Keeping Fernald Open Permanently.

As noted in our opening Petition, Judge Tauro's decision did not mandate that Fernald be kept open indefinitely. It simply required that the residents and their guardians be permitted to participate in the ISP process in the manner mandated in the 1993 Final Order. It allows the residents and their guardians to express a preference to remain at Fernald when the DMR solicits choices for further residential placements, and it mandates that Fernald be part of the discussion in the ISP process for families that express such a preference. That is, rather than simply ranking the choices offered by the DMR, the resident or guardian may, under Judge Tauro's order, express an opinion as to whether any proposed transfer would meet or fail to meet the equal or better standard and would provide all ISP mandated services for that resident. To the extent that the ISP process, prior to the August 2007 order, omitted Fernald as a choice in the placement discussion, that process effectively failed to consider whether the proposed transfer is or is not opposed by the resident or guardian. It also failed to provide an opportunity to consider whether any proposed alternative placement would meet the "equal or better" standard and would provide all ISP mandated services compared to Fernald.

Ultimately, the Court pointed out, the preference of a resident or guardian to remain at Fernald may not carry the day, and Judge Tauro made it clear that he was "simply ensuring that the DMR use the ISP process to adequately assess whether the setting is appropriate *and* whether it 'is not opposed by the affected individual.'" (App. 43). His order restored to the ISP process the right of the resident or guardian to be heard, it effectively provides the required constitutional safeguards, and it mandates that the DMR demonstrate that any alternative placement meets the "equal to or better" standard and that all ISP mandated services be provided. It does not give families absolute veto power over any proposed transfer or the ultimate closure of Fernald.

CONCLUSION

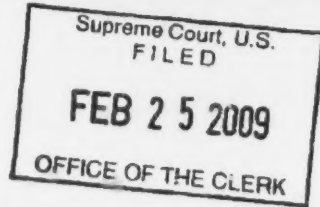
For the reasons stated above, this Court should grant the petition for certiorari.

Dated: New York, N.Y.
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No. 08-971

IN THE
Supreme Court of the United States

ROBERT SIMPSON RICCI, et al.,
Petitioners,

v.

DEVAL L. PATRICK, in his capacity as Governor of the
Commonwealth of Massachusetts, et al.,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit**

**BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*

Voice of the Retarded, Inc. ("VOR") is a nationwide advocacy organization dedicated to ensuring that individuals with mental retardation receive the care and support they need in a setting appropriate to fulfill those needs.¹ A corollary objective is to advance family participation in the choice of treatment options, with the decisions of the disabled person and his or her family recognized as primary.

VOR has previously appeared before this Court as *amicus curiae* in cases, like this one, that have a direct and significant impact upon the care and treatment of the mentally retarded. See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999); *Heller v. Doe*, 509 U.S. 312 (1993). VOR was also an *amicus curiae* in the court below. Pet. App. 5 n.2.

VOR is troubled by the decision below, in which the court of appeals substituted its own determination of the meaning of the consent decree at issue for the views of the district court. The district court's interpretation of the consent decree was, however, based upon input from numerous monitors, the wishes of the affected families, and decades of experience overseeing the management of the facilities at issue. Moreover, as an advocate for individual and family participation in treatment decisions, VOR is concerned that the effect of the opinion below, as the U.S. Attorney has suggested,

¹ The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, VOR states that no counsel for a party authored any part of this brief, and no person or entity other than VOR or its counsel made a monetary contribution to the preparation or submission of this brief.

will be to "unravel years of positive, non-abusive behavior" on the part of the petitioners, and undo the years of progress in Massachusetts for which the mentally retarded community and its families have struggled.

STATEMENT OF THE CASE

A. Background

This litigation began more than 35 years ago, when a class action was filed on behalf of the residents of the Belchertown State School, a state-run institutional facility for the mentally retarded. The complaint alleged that the conditions at these facilities were so inadequate as to deny the residents' due process rights to minimally adequate care, thus violating both federal and state statutes. Over the next three years, similar actions were filed on behalf of the residents of the Commonwealth's other residential facilities for the mentally retarded (Fernald, Wrentham, Dever, and Monson). *Ricci v. Okin*, 537 F. Supp. 817, 819 & n.4 (D. Mass. 1982) ("*Ricci I*"). These cases were consolidated before the district court (Tauro, J.).

Rather than litigating, the Governor and the Attorney General "concluded that 'the case would be indefensible.'" *Mass. Ass'n for Retarded Citizens v. King*, 668 F.2d 602, 604 (1st Cir. 1981). The Commonwealth thus joined with the plaintiffs, and, together with the district court, "devoted hundreds of hours of study, negotiation, and planning" with the goal of establishing, through interim consent decrees, minimum standards for the renovation of the facilities, staffing requirements, quality of services offered, retention of adequate personnel, and the availability of community residential facilities. *Ricci I*, 537 F. Supp. at 820; see also *Mass. Ass'n for*

Retarded Citizens v. King, 643 F.2d 899, 900 & n.1 (1st Cir. 1981).

During the course of the litigation, Judge Tauro repeatedly met with the parties, reviewed the level of the Commonwealth's compliance with the interim decrees, personally viewed the facilities, and sought input from other interested parties. *Ricci I*, 537 F. Supp. at 820-21. The court also enlisted assistance from state and federal officials, including the Secretary of the U.S. Department of Health and Human Services ("HHS") and at least four monitors, including the U.S. Attorney for the District of Massachusetts.

Even after a decade of efforts by the Commonwealth to achieve compliance, the Secretary of the HHS issued a report finding that "at every single institution there were substantive gaps between the promise of improvement and the reality of compliance with existing safety standards which are necessary to protect the residents." *Ricci v. Callahan*, 576 F. Supp. 415, 416 (D. Mass. 1983) ("*Ricci II*"). In light of that finding, the district court continued to meet with the parties, review surveys and investigations of state agencies, and monitor the Commonwealth's progress. See, e.g., *Ricci v. Callahan*, 646 F. Supp. 378, 380 (D. Mass. 1986) ("*Ricci III*"); *Ricci v. Okin*, 781 F. Supp. 826, 827 (D. Mass. 1992) ("*Ricci IV*").

By 1993, conditions at the facilities had improved, and the district court was able to cede its oversight through issuance of a final consent decree (the "Disengagement Order"). The Disengagement Order authorized the court to reopen the case if the defendants (a) "substantially fail to provide a state

ISP^[2] process in compliance with this Order”; (b) “systemic[ally] fail[] to provide ISP services required by this Order”; or (c) “are not in substantial compliance with this Order with regard to systemic issues.” *Ricci v. Okin*, 823 F. Supp. 984, 988 (D. Mass 1993) (“*Ricci V*”); Pet. App. 48-79.

B. The Commonwealth’s Plan To Close And Consolidate The State Schools

In budget acts passed from 2004 through 2007, the Massachusetts state legislature directed the Department of Mental Retardation (“DMR”) to “consolidate or close” the Commonwealth’s remaining institutional facilities, including Fernald. Pet. App. 6. These consolidations and/or closures were part of the Commonwealth’s policy to “reduce[] its institutional capacity” in light of the “national trends toward deinstitutionalization.” *Id.* at 7. The Commonwealth also justified the closings as being required by this Court’s decision in *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999); see Pet. App. 6-7, a view disputed by both Petitioners and *Amicus*.

From 2003 to 2006, the Commonwealth gradually transferred 49 of the 238 Fernald residents to other residential institutions or into community residences. Pet. App. 8-9. In February 2006, the remaining Fernald residents sought an injunction prohibiting further transfers pending investigation. *Id.* at 9.

² An “ISP” is an “Individual Service Plan” that “address[es] the individual’s residential and programmatic needs . . . medical needs, physical needs, equipment needs, guardianship needs and habilitation needs as a whole.” *Ricci IV*, 781 F. Supp. at 827 & n.4. The recommendations contained in the ISP “are based on evaluation of the actual needs of the resident or client rather than what facilities and programs are currently available.” *Id.* at 827 n.4.

That motion was granted by Judge Tauro, who also appointed a monitor—the U.S. Attorney for the District of Massachusetts—to “investigate whether the DMR’s past and prospective transfer of residents out of Fernald was in compliance with this court’s 1993 Final Order, and applicable law.” *Id.* at 35; *id.* at 46.

C. The Monitor’s Report And The District Court’s Reassertion Of Jurisdiction

After a year of investigation, the monitor found that the residents previously transferred by the DMR had obtained “equal or better” services at their new locations, but that the remaining “Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an “equal or better” service outcome.” Pet. App. 37-38. The district court agreed, finding that “the Commonwealth’s stated global policy judgment that Fernald should be closed ha[d] damaged the Commonwealth’s ability to adequately assess the needs of the Fernald residents on an individual, as opposed to wholesale basis,” as required by the ISP process. *Id.* at 39 (footnote omitted). Because the very purpose of the ISP process is to provide “an individual and personalized analysis” irrespective of the existence and availability of compliant facilities, the court found that “the declaration that Fernald will be closed . . . eviscerate[d] this opportunity for fully informed individualized oversight.” *Id.* at 40. Thus, having found a “systemic failure’ to provide a compliant ISP process,” the district court held that the Commonwealth had violated the Disengagement Order. *Id.* at 40-41. In reasserting jurisdiction on account of the violation, the court granted an injunction requiring that any communication from DMR regarding residential choices “shall include

Fernald among the options which residents and guardians may rank when expressing their preferences." *Id.* at 42.

D. The Commonwealth's Appeal

On appeal, the First Circuit held that "[t]he terms of the consent decree embodied in the Disengagement Order, like any contract construction issue, present an issue of law that we review de novo." Pet. App. 21 (citing *F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192 (1st Cir. 2006)). Stating that "[o]ur view of the proper construction [of the consent decree] is different from the district court's," *ibid.*, it concluded that "[t]his *individualized* process [the ISP requirement that each resident receive an individual evaluation of services that he or she requires]. . . cannot constitute a *systemic* failure." *Id.* at 27 (internal quotation marks omitted) *Ibid.* It therefore found the district court lacked jurisdiction to reopen and reversed. *Id.* at 28.

SUMMARY OF THE ARGUMENT

In applying a *de novo* standard of review, the court below exacerbated a well established split among the federal appellate courts on the appropriate standard of review of a district court's interpretation of its own consent decree. The Second, Sixth, Seventh, Ninth, and Tenth Circuits would have afforded substantial deference to the district court's ruling, in recognition of its extensive, and often more nuanced, understanding of the purpose and effect of the decree. Like the court below, the Third, Fifth, and D.C. Circuits apply a *de novo* standard of review, likening a consent decree to an unambiguous contract.

Amicus respectfully submits that the application of a *de novo* standard of review in the context of the case below is inappropriate. In applying a *de novo*

standard of review, the First Circuit seemingly gave no weight to the lower court's decades-long and fact-sensitive judicial intervention into the constitutionally required care of the mentally retarded. In treating the consent decrees incorporated in the Disengagement Order as everyday contracts, the court erred in two important ways. First, it substituted its own judgment for that of the district court on the interpretation of an order that was necessarily based upon the factual findings made by the very same district judge throughout this litigation. Second, it failed to recognize that even if a consent decree can be viewed as a contract between the parties, deference in interpreting that agreement should be accorded to the district court because "[o]ver time, the district court gains an intimate understanding of the workings of an institution and learns what specific changes are needed within that institution in order to achieve the goals of the consent decree." *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1338 (1st Cir. 1991).

For those same reasons, deference should be shown to that same court when it interprets an order drafted by its own hand. Doing so is justified in light of the district court's intimate involvement in the litigation below, and because of the equitable nature of consent decrees, and will foster judicial economy.

For these reasons, *amicus* respectfully requests that the Court grant the petition for *certiorari*.

ARGUMENT

I. THE DECISION BELOW UNDERSCORES THE NEED FOR THIS COURT TO RESOLVE THE CIRCUIT SPLIT ON THE STANDARD OF REVIEW TO BE APPLIED TO A DISTRICT COURT'S INTERPRETATION OF ITS OWN CONSENT DECREE.

The decision below deepened a longstanding and acknowledged circuit split on the standard of review to be applied to a district court's interpretation of its consent decrees. See *F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192 & n.4 (1st Cir. 2006) (recognizing disagreement between the Third, and Sixth Circuits on the appropriate standard of review); *Holland v. N.J. Dep't of Corr.*, 246 F.3d 267, 277-78 (3d Cir. 2001) (applying *de novo* review, but recognizing that the Second, Sixth, Seventh, and Ninth Circuits would have given deference to the district court); Childress & Davis, *Federal Standards of Review* § 2.23, at 2-141 (3d ed. 1999) (noting that while some circuits apply a *de novo* standard of review to a district court's interpretation of a consent decree "by analogy to the contract rule," others "seem to allow more discretion to the district court, at least when it is policing its domain").

As discussed in the petition and the brief of Wrentham, several circuits afford substantial deference to a district court's interpretation of its own consent decree, especially where, as here, the district court actively oversaw the litigation for a substantial period of time, or its interpretation was premised upon underlying factual findings made during the course of the litigation. See, e.g., *South v. Rowe*, 759 F.2d 610, 613 n.4 (7th Cir. 1985) (where district judge oversaw litigation for significant period of time, "his interpretation of the decree will be reversed only for

an abuse of discretion"); *Huguley v. Gen. Motors Corp.*, 52 F.3d 1364, 1369 (6th Cir. 1995) (noting the "well established principle that a district court's interpretation of its consent decrees is entitled to substantial deference on appeal"); see also *Labor/Community Strategy Ctr. v. L.A. County Metro. Transp. Auth.*, 263 F.3d 1041, 1048 (9th Cir. 2001) (purporting to apply *de novo* review, but stating that "[w]e must 'give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal.'" (emphasis added); *In re Application of City & County of Denver*, 935 F.2d 1143, 1147-48 (10th Cir. 1991) ("the district court's views on interpretation of a consent decree are entitled to deference") (internal quotation marks omitted); *Berger v. Heckler*, 771 F.2d 1556, 1558-59 & n.2 (2d Cir. 1985) (applying deferential review because of district judge's position in overseeing decree).

In conflict with these decisions, the First,³ Third, and D.C. Circuits liken consent decrees to voluntary contractual arrangements and show no deference to the district court's interpretation. See, e.g., *Pet. App. 21*; *United States v. W. Elec. Co.*, 907 F.2d 1205, 1209 (D.C. Cir. 1990); *Holland*, 246 F.3d at 278 ("adher[ing] to the long tradition in this Circuit of

³ In applying *de novo* review here, the First Circuit panel seems to have rejected *sub silentio* its previous suggestions that a more deferential standard should apply in public law litigation. See *Navarro-Ayala*, 951 F.2d at 1337-38 (suggesting deferential review is owed to a district court's "interpretation of broad, programmatic decrees entered into in public law litigation"); *Mass. Ass'n for Retarded Citizens*, 668 F.2d at 607-08 (same).

reviewing a district court's interpretation of a consent decree *de novo*").

Only review by this Court can restore order to this body of law. Moreover, resolution of this recurring issue is of paramount importance as the standard of review frequently is outcome determinative, yet infrequently the subject of careful analysis. See generally Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Seattle U. L. Rev. 11, 12 (1994) ("It would be difficult to name a significant legal precept that has been treated more cavalierly than standard of review."). Because this conflict cannot be resolved in the lower courts, and, as here, the choice of a particular standard of review will continue to lead to differing results in like cases, the writ should be granted.

II. THE STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS UNDERMINES THE ROLE OF THE DISTRICT COURT IN FORMULATING AND INTERPRETING THE CONSENT DECREE.

Application of a *de novo* standard of review to the interpretation of consent decrees conflicts with this Court's guidance on the appropriate standard of review where, as here, the trial court is acting in a supervisory capacity; it also ignores the historical deference paid to district courts acting in equity. The contract analogy invoked by the First Circuit also overlooks the unique role the district court played in supervising the events leading up to the consent decree. Unfortunately, these errors proved to be outcome determinative; even moderate deference to the district court's ruling would have led to a different result.

A. Deference Is Required Where A District Court's Interpretation Depends Upon The Perspective Acquired Through Its Long-Standing Supervision Of The Underlying Litigation.

This Court has acknowledged that where, as here, a statutory prescription is lacking, it may be "uncommonly difficult" to determine the appropriate standard of review. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Nonetheless, touchstones exist for determining what standard is to apply. For example, this Court has recognized that "[i]t is especially common for issues involving what can broadly be labeled 'supervision of litigation' . . . to be given abuse-of-discretion review." *Id.* at 559 n.1; accord *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991). Indeed, the district court's enforcement of the Disengagement Order here epitomizes the concept of the "supervision of litigation" role, thus confirming that the First Circuit should have reviewed the order for abuse of discretion.

The district court found that the Commonwealth's determination to close Fernald interfered with its requirement to "adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis." Pct. App. 39. Under the governing regulations, an ISP must be "based upon actual needs of the individual without regard to the availability of [the necessary] supports." 115 Mass. Code Regs. 6.23(1). Yet, based on its oversight of the litigation, the district court found that the Commonwealth's refusal to make such case-by-case determinations of the Fernald residents' "actual needs" meant that the Commonwealth's "administration of the ISP process amount[ed] to a 'systemic failure' to provide a compliant ISP process, within the meaning of the

Final Order.” Pet. App. 40; see *Ricci V*, 823 F. Supp. at 988. Accordingly, having found a breach of the requirements of its Disengagement Order—itsself the outgrowth of decades of successive consent decrees—the district court reasserted jurisdiction.

Thus, the question for review by the First Circuit was whether the district court correctly concluded that the DMR’s refusal to allow Fernald residents to express a preference to remain at Fernald was a “systemic failure’ to provide a compliant ISP process” that would have allowed the district court to reopen the case. Pet. App. 40; *Ricci V*, 823 F. Supp. at 988. The operative condition for reopening did not stem from a statute, regulation, or precedent of a higher court. It was a standard formulated by the district court itself in 1993, based on its longstanding supervision of the litigation and its view about the circumstances in which further intervention by the court might be required. Thus, in exercising jurisdiction, the district court simply found that its own previously articulated standard had been satisfied, relying in significant part upon the year-long investigation of the U.S. Attorney. Pet. App. 34-40. See generally *Salve Regina Coll.*, 499 U.S. at 233 (“deferential review of mixed questions of law and fact is warranted when it appears that the district court is ‘better positioned’ than the appellate court to decide the issue in question”); *Pierce*, 487 U.S. at 559 n.1.

The First Circuit overlooked the role that the district court’s supervision of the underlying litigation played in crafting the standards that would govern reengagement and in finding that those standards had been satisfied. Instead, characterizing the consent decree as a “contract,” the appellate court stated that its “view of the proper construction [of the

consent decree] is different from the district court's." Pet. App. 21. However, the First Circuit never articulated precisely what "construction" of the Disengagement Order changed the outcome. Indeed, there was no disagreement between the First Circuit and the district court on the meaning of the word "systemic." Rather, the appeals court disagreed that the specific facts found by the district court amounted to a "systemic failure" within the meaning of the Disengagement Order, and thus substituted its view for that of the district court.

Assuming, as the First Circuit did, that the question presented was one of interpretation of the consent decree (as opposed to a finding of fact to be analyzed under a "clearly erroneous" standard),⁴ the question of whether the Commonwealth's implementation of the ISP process was compliant (especially in light of the evidence of coercion and intimidation of the Fernald residents, see Wrentham Ass'n for Retarded Citizens Br. at 10-13 (filed Feb. 18, 2009)) is precisely the type of determination that a district court is uniquely qualified to make. See, e.g., *Pierce*, 487 U.S. at 559-60 ("[W]ith regard to the problem of determining whether mixed questions of law and fact are to be treated as questions of law or of fact for purposes of appellate review, . . . sometimes the decision 'has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question'").

⁴ Notably, the Commonwealth argued below that "clearly erroneous" review applied to the district court's findings which triggered its decision to reopen. Appellant's Br. 30 & n.30, *Ricci v. Patrick* (1st Cir. Mar. 20, 2008) (No. 07-2522)..

A *de novo* standard of review also gives no weight to the judicial fact-finding implicit in the district court's interpretation of the consent decree and evaluation of its implementation. Reliance on the hypothetical analogy between a consent decree and a contract—despite the nature and history of the consent decrees at issue here—is to disregard the days of hearings, months of negotiations, years of review, and decades of oversight that informed the district court's analysis. See *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981) (“[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it”); *In re Application of City & County of Denver*, 935 F.2d at 1147-48 (giving deference to district court's interpretation of consent decree where trial judge interpreted and enforced two overlapping consent decrees in litigation over which he had presided for decades).

B. Deference Is Appropriate Because The Role Of The District Court In Interpreting The Decree Was An Exercise Of Its Equitable Powers.

Deferring to the district court when it formulates and interprets its own consent decree also is consistent with the discretion historically accorded to courts of equity. In that role, district courts have great latitude to act in the interests of justice. “The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.” *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); see also, e.g., *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955); *Holmberg v. Armbrrecht*, 327 U.S. 392, 396 (1946).

Inextricably linked to that historical flexibility is a deferential standard of review. See *Meredith v. City of Winter Haven*, 320 U.S. 228, 235 (1943) ("An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determination of courts of equity."). Accordingly, when a district court interprets a consent decree in its role as a court of equity, deference to its rulings should necessarily follow. See Childress & Davis, *supra* § 2.23, at 2-141 (affording deference to a district court's interpretation of its own consent decree "makes sense, since the judge is acting in equity — traditionally discretionary — in enforcing his injunction"); *United States v. Am. Cyanamid Co.*, 719 F.2d 558, 564 (2d Cir. 1983) ("when the language of a consent decree provision is not clear on its face, a court of equity may, in construing the provision, consider the purpose of the provision in the overall context of the judgment at the time the judgment was entered").

C. In The Context Of This Litigation, The Analogy Of The Consent Decree To A Contract Is Misplaced.

In joining the other circuits that have applied a *de novo* standard of review to a district court's interpretation of a consent decree, the First Circuit relied upon the oft-used but imprecise analogy that the interpretation of a consent decree is "like any contract construction issue." Pet. App. 21. While it is true that consent decrees must be interpreted, when possible, by resort to the plain language of the agreement, see *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), that fact alone does not justify the analogy to between a consent decree and an ordinary contract. Particularly in cases where the district court is required to interpret a consent decree

it drafted, or the decree results from extensive judicial supervision, the principles of contract interpretation are only the starting point of the analysis.

The *sine qua non* of a contractual arrangement is that it is voluntary. See O.W. Holmes, *The Common Law* 302 (1881) ("As the relation of contractor and contractee is voluntary, the consequences attaching to the relation must be voluntary."). It is this underlying voluntary character of the obligations freely exchanged that justifies *de novo* review in the arena of contract interpretation. For when resort to the plain language of a contract does not definitively resolve a disputed issue, the reviewing trial court stands in no better situation than any other stranger to the contract to determine the precise scope of the parties' agreement. Accordingly, the trial court's views as to that meaning are not accorded deference in those cases.

But consent decrees are not the consequence of purely voluntary action. This Court has observed that "[w]hile [consent decrees] are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court or administrative agency." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975). The voluntariness of a consent decree, therefore, is impaired by the existence of a tribunal that will adjudicate the rights and obligations of the parties if no settlement is reached; moreover, the tribunal can refuse to approve or modify a consent decree, notwithstanding the parties' wishes. See, e.g., *Williams v. City of New Orleans*, 729 F.2d 1554, 1559-60 (5th Cir. 1984) (en banc); *Am. Cyanamid Co.*, 719 F.2d at 565 ("[W]hile it is generally true that

contract law provides that parties to a contract may, by agreement, subsequently modify the contract without court approval, this is not the case with respect to consent decrees, since modification thereof always requires court approval due to their quasi-judicial nature") (citation omitted). Given its essential role in approving a consent decree, the district court is uniquely qualified to interpret and expound upon precisely what obligations were undertaken by the parties.

Moreover, far from being a mere bystander to the making of the parties' agreement, the court may be the prime mover in consummating an arrangement through either direct negotiation or *in terrorem* efforts to have the parties do so. See generally Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284, 1298-1300 (1976) (noting the breakdown of the traditional adversarial model in consent decree cases, and recognizing that "the judge is the dominant figure in organizing and guiding the case"). Judge Tauro's hands-on involvement deprives the consent decree and Disengagement Order here of any resemblance to an arms'-length transactions voluntarily entered into by the parties.

The lack of voluntariness, as well as the tripartite relationship inherent in the formation of consent decrees, both suggest that deference should be shown to the district court's interpretation. In the event of ambiguity regarding the decree's terms, the views of the court that approved the decree and oversaw the parties' negotiations are essentially extrinsic evidence that may properly be used in determining the decree's meaning. Cf. *ITT Cont'l Baking Co.*, 420 U.S. at 238 ("reliance upon certain aids to construction" is proper in determining the meaning of a

consent decree). Treating the district court's interpretation as extrinsic evidence as to the meaning of the decree (i.e., with some deference) preserves the primacy of the parties' intentions as to the scope of the decree, while, at the same time, recognizing the district court's unique role as participant, facilitator, and adjudicator. See *Ricci I*, 537 F. Supp. at 824 ("the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication").

III. JUDICIAL EFFICIENCY ALSO SUPPORTS DEFERENTIAL REVIEW.

The application of a particular standard of review to specific categories of issues is, in part, a form of allocation of judicial resources. See Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. Kan. L. Rev. 1, 4 (1991) ("Standards of review serve to allocate decision-making responsibility among the various levels of courts in a hierarchical judicial system."). Affording deference to a district court's interpretation of a consent decree enhances judicial efficiency by recognizing the district court's unique role in the formulation of such agreements.

Generally, the application of a *de novo* standard of review in a particular case reflects a judgment that the correctness of a lower court's decision can be measured by an objective standard just as easily divined by an appellate court on a more limited record. While such a standard may be justified when it comes to interpreting a statute, a simple contract, or precedents from a higher court, that rationale fails in the institutional reform context in light of the myriad and nuanced issues that must be accounted for in overseeing the operation of public policy. Affording deference to the district court in such

circumstances is warranted because the lower court's day-to-day involvement simply provides a more reliable platform from which to view the questions in their proper context. See *Salve Regina Coll.*, 499 U.S. at 233; *Navarro-Ayala*, 951 F.2d at 1338; *Foufas v. Dru*, 319 F.3d 284, 286 (7th Cir. 2003) (district court judges' extensive involvement in overseeing consent decrees "may [provide them] insights into the meaning of the decree . . . that are denied to the appellate judges who review the judge's decision").

The need for deference is especially acute where, as here, the court is overseeing institutional reform litigation involving multiple facilities, numerous state and federal agencies, and hundreds of families. The sheer magnitude of input that Judge Tauro received from those involved, as well as the decades of experience in overseeing the litigation, all of which informed his decision below, cannot be summarized, let alone duplicated, by the appellate court on a limited record.

Moreover, deference to the district court in these circumstances will not override or undermine the appellate courts' responsibility to announce guiding principles of law for lower courts to follow. Especially in cases, like this one, involving exhaustive and detailed efforts to reform institutional facilities, appellate review serves little to no "instructive" value outside of this particular case. As this Court detailed in *Pierce*:

One of the 'good' reasons for conferring discretion on the trial judge is the sheer impracticability of formulating a rule of decision for the matter in issue. Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow

facts that utterly resist generalization—at least, for the time being.

487 U.S. at 561-62. Due to the intricacies of the institutions often involved, varying procedural histories, the fact-specific nature of the wrongs to be remedied and the relief sought, the interpretation of consent decrees in institutional reform litigation presents precisely the situation where “the investment of appellate energy will . . . fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law.” *Id.* at 561. Accordingly, the appellate court’s function of clarifying the law to guide the prospective conduct of nonparties and providing uniformity of rules of decision is hardly implicated, let alone hindered.

IV. THE DECISION BELOW FAILED TO APPRECIATE *OLMSTEAD*.

In addition to the First Circuit’s error in applying the wrong standard of review, *Amicus* is concerned that the decision below failed to recognize core principles of *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), and thus may place disabled persons at risk of constitutional deprivation going forward. Below, the Commonwealth argued (and the First Circuit did not reject the notion) that allowing class members simply to *express* their desire to stay at Fernald would “run afoul” of *Olmstead*. Pet. App. 6, 42 n.16; see also Appellant’s Br. at 29-30. The Commonwealth’s erroneous interpretation of *Olmstead* as sword (forcing transfer to the community) rather than shield (prohibiting denial of appropriate community transfer requests) is, sadly, all too common.

In *Olmstead*, this Court reinforced the rights of individuals with mental retardation to choose the

residential setting that is most appropriate for each of those persons. 527 U.S. at 599-601. The decision challenged states to prevent and correct unjustified institutionalization, while endorsing the proposition that mentally retarded individuals and their families should be able to choose from an array of residential options. *Id.* at 601-02. The DMR and its *amici* below misinterpret *Olmstead* as support for the elimination of facility-based care. Based on its misreading of *Olmstead*, DMR successfully espoused the view that "deinstitutionalization is in the best interests of the Fernald residents," but ignored that some Fernald residents reject that view, and the monitor's conclusion that, for some Fernald residents, a transfer "could have devastating effects that unravel years of positive, non-abusive behavior." Pet. App. 4, 17 (internal quotation marks omitted) (quoting Monitor's Report).

Amicus agrees that community care can be an appropriate choice and supports the rights of those who desire to live in the community. *Amicus*, however, adamantly rejects the Commonwealth's apparent impression that *Olmstead* somehow suggests that institutional care is always inappropriate. See *Olmstead*, 527 U.S. at 601-02 (the ADA does not "condone[] termination of institutional settings"); see also *id.* at 605 (plurality op.) ("Each disabled person is entitled to treatment in the most integrated setting possible for that person—recognizing that, on a case-by-case basis, that setting may be in an institution.") (quoting *Amicus* Brief of Voice of the Retarded, *et al.*).⁵ However, Justice Kennedy correctly observed

⁵ Indeed, the district court below recognized the need for both venues. *Ricci II*, 576 F. Supp. at 417-18 ("The fact is that there should have been both community and institutional programs

that the otherwise laudable goal of making community placement more readily available could have disastrous effects if applied in cookie-cutter fashion to the developmentally disabled community:

It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act . . . to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision.

Id. at 610 (Kennedy, J., concurring in judgment). The Commonwealth's success below in convincing the court of appeals that community care can be foisted upon those who do not want it threatens *Olmstead's* core and the intent and effect of the district court's consent decrees in this litigation.

for the retarded. Title XIX and the consent decrees permit such an approach.").

CONCLUSION

For the foregoing reasons and those stated in this petition, the petition for a writ of *certiorari* should be granted.

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